Indian Claims Commission

Alexis First Nation

Report on: TransAlta Utilities Rights of Way Claim

Indian Claims
Commission

Commission
des revendications
des Indiens

March 20, 2003

Chief Roderick Alexis
Alexis First Nation

The Honourable Robert Nault
Minister of Indian Affairs and Northern Development

The Honourable Anne McLellan
Minister of Justice and Attorney General of Canada

RE: Alexis First Nation Inquiry – TransAlta Utilities Rights-of-Way Claim

In February, 1999, counsel for the Alexis First Nation wrote the Indian Claims Commission requesting an inquiry on behalf of their client. On April 27, 2000, the Commission issued an interim ruling, in response to a mandate challenge brought forward by Canada, that it would proceed with this inquiry.

A planning conference was held on July 28, 2000, and the inquiry continued with a community session during which the Commissioners heard from elders regarding the First Nation's oral history. The Commission proceeded to oral submissions on August 20, 2002, in Edmonton, Alberta.

The review of the facts of this claim, together with our legal analysis, findings, and recommendation to the parties, is set out in the attached report.

FOR THE INDIAN CLAIMS COMMISSION

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INDIAN CLAIMS COMMISSION

ALEXIS FIRST NATION INQUIRY

TRANSALTA UTILITIES RIGHTS OF WAY CLAIM

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March 2003

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EXECUTIVE SUMMARY

BACKGROUND

On August 21, 1877, the ancestors of the present-day Alexis First Nation executed an adhesion to Treaty 6. Pursuant to the treaty, Indian Reserve (IR) 133 was set aside for the Alexis Band on the north shore of Lac Ste Anne, approximately 60 kilometres northwest of Edmonton, Alberta. The reserve covered 23 square miles.

The specific claim of the Alexis First Nation concerns the federal Crown's grants of three rights of way to Calgary Power on Alexis IR 133 during the 1950s and 1960s. The first right of way, granted in 1959, concerned an electrical distribution line that served the Alexis Day School on the reserve. The Band was promised jobs to clear the land but received no compensation for the right of way. The second distribution line right of way, granted in 1967, extended from the 1959 line south to a location outside the reserve and was initially intended to serve cottages at West Cove on the south shore of Lac Ste Anne. It also brought electricity to houses on the Alexis reserve. The Band received compensation for the right of way in the amount of $195. Both the 1959 and 1967 distribution line permits were granted pursuant to section 28(2) of the *Indian Act*, and both permits required Band Council consent.

In 1969, Calgary Power received a permit from the Crown for a right of way to build a high-voltage transmission line across the reserve, serving only communities outside the reserve. It was approved pursuant to the corporation's enabling legislation and the expropriation provisions in section 35 of the *Indian Act*. The Band was not required to provide its consent but did pass a Band Council Resolution (BCR) agreeing to the terms of the transaction. The Band received a one-time lump sum payment of $4,296 in compensation, and band members were promised jobs clearing the right of way.

The specific claim alleges that Canada failed to protect the interests of the Alexis Band in each of the three transactions, but the main focus of the claim is the 1969 transmission line. In particular, the claim asserts that Canada breached its fiduciary obligations when it failed to obtain annual payments for the Band in the 1969 agreement, failed to advise the Band that, pursuant to the agreement, it could levy taxes on Calgary Power, and failed to assist the Band to realize that tax revenue. The essence of the claim, according to the Alexis First Nation, is that Canada failed to achieve fair and reasonable value for Calgary Power's use of reserve land under the 1969 agreement, resulting in a continuing loss of revenue until the late 1990s, when the First Nation began collecting tax revenue from the corporation.

The specific claim was launched in 1995 and formally rejected by the government in January 2001 following a decision in April 2000 by the Indian Claims Commission (ICC), on application of the First Nation, to deem the claim rejected and commence an inquiry.

FINDINGS

Vulnerability

We find, as a question of fact, that the Alexis Band in the 1950s and 1960s was vulnerable and dependent on the Department of Indian Affairs and Northern Development (DIAND) to represent the Band's interests in the negotiations that ensued with Calgary Power for the three rights of way, in particular the negotiations for the transmission line. The harsh economic times and unemployment on the reserve, coupled with a lack of education, little knowledge of the English language, and a relatively poor relationship with the Indian Agents, created an environment in which the Band's leadership was at an obvious disadvantage in face-to-face negotiations with representatives of a major power corporation. This finding is supported by the community testimony and the government's own documents, in particular a 1966 report advising that the Alexis Band would require considerable guidance for some time.

Compensation for the 1959 and 1967 Distribution Lines

The 1959 Line

The First Nation contends that the failure to obtain any compensation for the right of way to bring the1959 distribution line to the Alexis Day School was a breach of the Band's right under treaty not to have any part of its reserve land alienated for the purpose of satisfying another treaty right, the right to education, without receiving some compensation. Unfortunately, this argument was advanced without the requisite analysis of the rights in question, making it impossible for us to agree or disagree with the First Nation's position that the Crown had breached the Band's treaty rights. Further, the First Nation was not aware of any legal precedents to assist its argument that, when electricity was brought to the school at the Crown's expense solely for the benefit of the First Nation, the Crown ought to have provided compensation in addition, since the line necessarily encroached on reserve land.

There was also no fiduciary obligation to obtain compensation for the Band. Notwithstanding the Band's vulnerability, the Band Council understood that the line would bring electricity to the school, it was perceived by the people to be a benefit, the Band Council consented through a BCR, and it made good sense and was in the Band's best interest to introduce electricity to a community that had been without it.

The 1967 Line

We infer from the evidence that, although the 1967 distribution line extension was originally planned to service the West Cove cottages off the reserve, its collateral purpose was to service houses on the reserve in the vicinity of the right of way. The Alexis Band was paid a modest amount of compensation. Without any evidence to suggest that the amount of $195 was patently unreasonable in circumstances in which the Band also benefited from access to electricity, we are unable to agree with the First Nation that Canada owed a duty to obtain better terms for the Band.

The 1969 Transmission Line

Justification for Expropriation of Reserve Land

The First Nation raised the issue of a lack of valid public purpose to justify an expropriation of reserve land for the first time in its written submissions. As a result, Canada had no opportunity to bring forward additional evidence, and the Commission did not consider this question. The analysis proceeded on the assumption, therefore, that the 1969 transmission line permit met the technical requirements of the *Indian Act*.

The Fiduciary Relationship

The issues and arguments regarding the fiduciary duties owed by the Crown to the First Nation in the context of an expropriation are the main focus of this claim.

Both parties agree that certain fiduciary duties arose during the period when the Crown was negotiating a final agreement with Calgary Power to run a transmission line across the Alexis reserve. They disagree, however, on the nature and scope of those duties.

What distinguishes an expropriation of reserve land from a surrender is the important fact that in an expropriation, unlike a surrender, the band does not make the ultimate decision. The sole discretion to approve an expropriation lies with the Crown, who must balance the best interests of a band, including the preservation of its reserve land, with the public purpose of providing adequate electrical services to the general population. For this reason, we find that the duty applicable in a surrender – namely, the Crown's duty to prevent an exploitative arrangement, as enunciated in the *Apsassin* case, does not address adequately the circumstances of an expropriation. Instead, we agree with the First Nation that the fiduciary duty goes beyond the prevention of exploitation where the Crown exercises complete power over the decision. We agree that, although the general duty to prevent exploitation must be examined, the more appropriate question to ask – one that was applied in *Apsassin* to the Crown's unilateral transfer of mineral rights on the surrendered reserve – is whether a reasonable person of ordinary prudence managing his own affairs would agree to the arrangement.

We also agree with Canada that the Crown has a duty, as expressed in the recent *Osoyoos* case, to minimally impair the interest of a band in an expropriation, but we recognize that the Court in *Osoyoos* was not asked to address the scope of the Crown's fiduciary obligations in negotiating a compensation package on behalf of a band. We consider that the "minimal impairment" test means that the band's legal interest in the land is to be affected as little as possible when reserve land is expropriated, but that this test represents only one of several duties that may arise.

Duty to Advise the Band

The evidence indicates that Calgary Power likely negotiated the terms that were contained in the 1968 BCR directly with the Band Council without the knowledge of or input from Indian Affairs. Once it learned that the Band had agreed to a right of way for a transmission line, however, the Crown ought to have realized that the Band, given its vulnerability and dependence in those years, was at a disadvantage in negotiating directly with Calgary Power. The Crown, therefore, had a duty to scrutinize the deal, in particular by finding out the cost to Calgary Power of rerouting the line outside the reserve, and it had a duty to share this information with the Band. On the evidence before us, the Crown's agents did not provide adequate information to the Band regarding its options during the 15 months between the signing of the BCR and the government's final approval of the right of way.

Duty to Obtain Independent Appraisal

The Crown obtained information on land values in the adjacent area from a DIAND official. Although the Crown did not obtain an independent appraisal, the per acre value of $100 for the Alexis right of way appeared to be well within the range of land prices at the time. Recent evidence that the utility corporation paid $95 per acre in 1969 for an easement over non-reserve, cultivated land adjacent to the reserve corroborates the Crown's earlier assessment. The fact that the Crown did not retain an independent appraisal is not tantamount to a breach of fiduciary duty in these circumstances.

Was the 1969 Lump Sum Payment Exploitative?

We are persuaded by the exchange of correspondence among DIAND officials directly responsible for recommending that the 1969 transaction be approved on the basis of a one-time lump sum payment that they knew or ought to have known that this transaction was unjust and not in the Band's best interest. We find that certain departmental officials acted conscientiously in trying to improve the terms for the Band but that ultimately the government approved a transaction in which the terms of compensation were known to be inadequate.

The departmental policy on compensation for expropriations on reserve land was under review at the time but, regardless of which policy was in place, it cannot shield the Crown from responsibility when it concerns the Crown's duty to First Nations. The Crown also had 15 months within which it might have revisited the terms of the agreement in an attempt to get a deal that would provide annual payments to the Band, but it made no serious efforts to do so. The Band Council was kept in the dark about its options and continued to be motivated by the prospect of jobs to clear the right of way.

The Crown had a duty to prevent an exploitative transaction but it failed to do so. Moreover, we find that, in applying the *Apsassin* test of the reasonable person managing his own affairs, the Crown would not have made this deal for itself, given its awareness that a one-time lump sum arrangement was inadequate compensation for a long-term interest. Instead, the Crown was willing to acquiesce to the commercial interests of Calgary Power and put the Alexis Band's interests second.

Duty with Respect to Taxation and Minimal Impairment

Although the historical record does not provide any evidence that the standard practice in adjacent municipalities at the time was to obtain an annual charge or fee from Calgary Power, the First Nation obtained reliable evidence from a consultant in preparing its claim showing that information on assessments and taxes for off-reserve locations in the area were part of the public record, and that a portion of the same transmission line on land that became part of the reserve in 1996 had been subject to taxation since 1968 as part of Lac Ste Anne County's assessment. Given our finding that compensation in the form of annual payments with periodic reviews was recognized by the Crown as necessary to provide adequate compensation to bands, it became part of the Crown's duty to investigate all possible alternatives, including taxes or grants in lieu of taxes. This information was readily available, but, by not obtaining and discussing this option with the Band, the Crown breached its fiduciary duty.

The Band was not told that a taxation clause permitting it to levy taxes on Calgary Power had been written into the agreement between the Crown and the company. The Crown knew, however, that the *Indian Act* prohibited the Band from exercising this power until, in the opinion of the Governor in Council, it had reached "an advanced stage of development." The evidence is persuasive that the Band Council did not have the capacity in 1969 to implement a taxation bylaw, nor did they understand the concept of taxing third parties.

We agree with Canada that the Crown met the duty of minimal impairment to the Band's interest in the reserve lands by inserting the taxation clause into the agreement, even though it could not be exercised. What we disagree with is Canada's contention that no fiduciary duty existed to advise the Band of its taxation power or to take any steps to implement it. We find that, given the inadequacy of the lump sum compensation, the Crown had a fiduciary duty to explain to the Band that it had this authority and to take remedial action that would better serve the Band's interests. The only viable way to do this once the agreement was finalized was to help the Band to implement its taxation authority and, if necessary, to collect the tax equivalencies on its behalf.

Duty to Assist with Taxation Bylaw after 1969

According to the *Apsassin* decision, the fiduciary duty of the Crown is a continuing duty that does not end at the date on which the land is alienated. The Crown could have made efforts in the years following the approval of the transmission line right of way to bring the Alexis agreement into line with its new policy on compensation, but it chose not to disturb the agreement. Having recognized the unfairness of providing a lump sum payment in cases of expropriation before the Alexis deal was given final approval, the Crown had an ongoing duty, as well as the ability, to correct the problem and recoup some of the losses suffered by the Band over time.

We agree with Canada that, in principle, the Crown is not expected to start implementing all sorts of bylaws on behalf of First Nations, but in this case the Crown had a duty to take steps to use the Band's taxation authority to obtain tax revenues for it. The *Indian Act* prohibition was a matter totally within the Crown's discretion. It cannot and should not be used as a defence for inaction when the Crown had an ongoing duty in the three decades following the approval to right a wrong.

Duty to Obtain Informed Consent

The Crown had no statutory obligation to obtain the Band's consent to the transmission line right of way. Nevertheless, to its credit, the Crown had established a practice of seeking band consent prior to requesting final approval of the Crown's agreement with the expropriating authority. Further, we find that the Band Council would have had an honest belief that its consent was required, given previous encounters with Calgary Power. In these circumstances, the Crown's fiduciary duties included the duty to obtain consent to the right of way and to ensure that it was an informed consent.

There are two pieces of information that, in our view, are critical to a finding that the Band gave its informed consent. The first item, which was never adequately dealt with by the Crown, was the apparent discrepancy between the land to be compensated for and the significantly greater area that was to be cleared for safety reasons but not compensated for. Had officials been actively counselling the Band and pointed out this discrepancy, the Band Council may well have questioned the level of compensation.

The second important piece of information not shared with the Band was the Crown's accumulated knowledge that annual rents and renewal provisions were considered to be fairer than lump sum payments. We find that the initial Band Council Resolution did not represent the informed consent of the Band, given the likely absence of Crown agents during the initial discussions with Calgary Power, the subsequent passage of time before final approval, and the lack of any serious attempt on the part of Crown agents to discuss with the Band the possibility of obtaining better terms. The evidence that the Band became indecisive about its wishes after signing the BCR, coupled with the lack of evidence that the Crown followed up with the Band to deal with its indecision, persuade us that the Band did not have sufficient knowledge to give its informed consent during the 15 months before final approval.

CONCLUSIONS AND RECOMMENDATION

We conclude that the Crown breached a number of fiduciary duties, in particular the duty to prevent an improvident or exploitative arrangement, given the Crown's knowledge that a one-time lump sum payment for a long-term interest on reserve land, for which the Band received no ongoing benefit, was inadequate and unjust. We also conclude that, in applying the *Apsassin* test of the reasonable person managing his own affairs, the Crown would not have made such a deal for itself in 1969. Having done so on behalf of the Alexis Band, however, the Crown had a further duty to assist the Band to implement its taxation authority, if necessary collecting the revenues on the Band's behalf, as the most viable means of recouping some of the losses under the expropriation agreement.

We recommend therefore that the Alexis First Nation's claim be accepted for negotiation under Canada's Specific Claims Policy.

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

In 1959, Calgary Power Ltd. (Calgary Power) – the corporate predecessor to present-day TransAlta Utilities Corporation (TransAlta) – installed an electrical distribution line to provide power to the new Alexis Indian Day School situated in the southeast quarter of section 11, township 55, range 4, west of the 5th Meridian (SE 11-55-4-W5M) within the Alexis Band's Indian Reserve (IR) 133.[1] The reserve, located roughly 60 kilometres northwest of Edmonton, was not served by electrical power before that time. A 30-foot right of way was specified for this line but its precise area is unclear because it was never surveyed. It is located a short distance north of Lac Ste Anne, which forms the natural southern boundary of the reserve. The line extends due west from the east boundary of the reserve for a distance of 1.4 kilometres (7/8 mile) before angling southwest for another 1.6 kilometres (one mile) to the school site. Under the terms of the permit between Canada and Calgary Power, the company was empowered under section 28(2) of the *Indian Act* to exercise its rights within the right of way[2] "for such period of time as the said right-of-way is required for the purpose of an electric power transmission line." The Band received no payment under the permit, although it was agreed that band members would be paid to clear the right of way.

Eight years later, in 1967, Calgary Power ran a branch line off the 1959 distribution line, primarily to serve cottages at West Cove on the south shore of Lac Ste Anne. Until this time, the Day School had represented the only building on IR 133 serviced by electrical power, but with the arrival of Canada's Centennial year, a broader program of electrification on the reserve commenced, delivered by means of the 1959 and 1967 distribution lines.[3] The 1967 line extended from a point within the reserve on the earlier line in a southeasterly direction to the north shore of Lac Ste Anne, then along the shore to a narrowing in the lake, referred to by members of the First Nation as The

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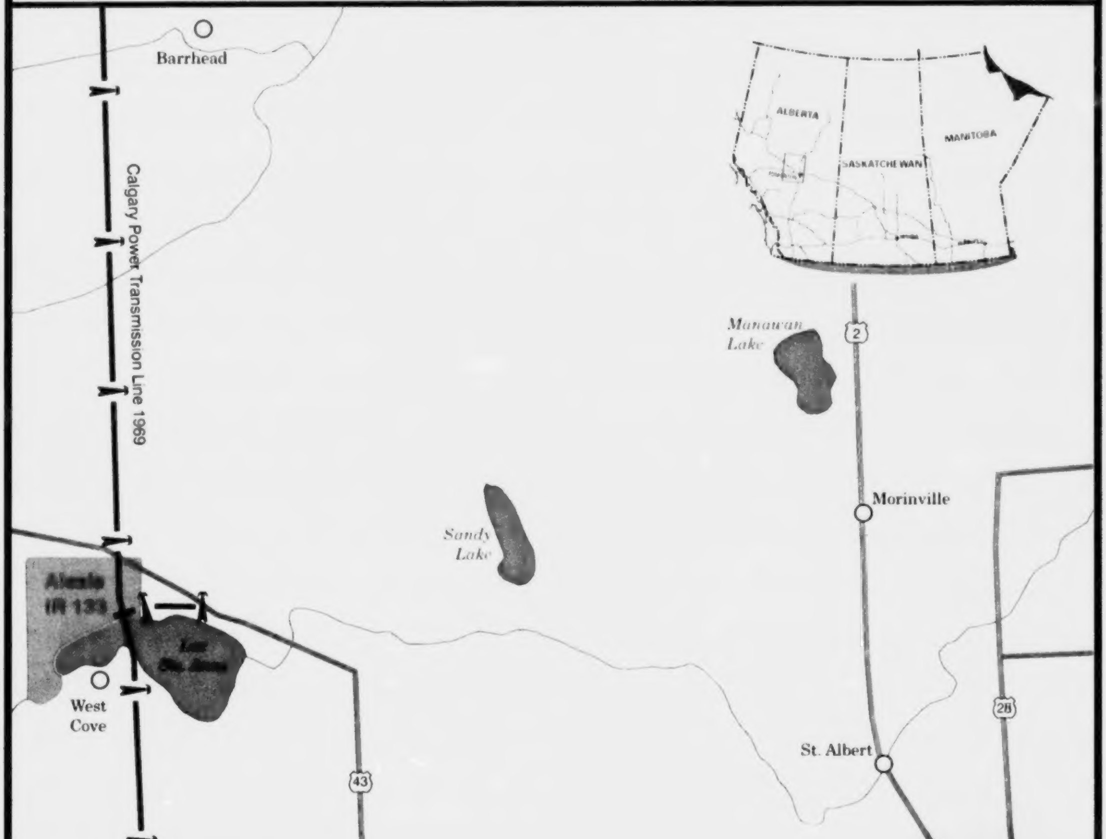
[1] Depending on the historical context, the Alexis First Nation will be referred to alternatively as the "Alexis Band," the "Band," or the "First Nation."

[2] The terms "right of way" and "easement" are used interchangeably in the historical documents.

[3] Indian Claims Commission (ICC) Transcript, December 5, 2001 (ICC Exhibit 11, p. 76, Howard Mustus).

Map 1


Barrhead
Calgary Power Transmission Line 1969
ALBERTA
SASKATCHEWAN
MANITOBA
Manawan Lake
2
Morinville
Sandy Lake
Alexis IR 133
Lac Ste. Anne
West Cove
43
28
St. Albert
EDMONTON
16
Stony Plain
Spruce Grove
16
Wabamun Lake
Wabamun IR 133 A
Stony Plain IR 135
60
2
Devon
Calmar
Leduc
39

Narrow or The Narrows; at that point, the line paralleled the nearby roadway and bridge across The Narrow to the south shore. Comprising a total surveyed area of 1.14 acres, the 30-foot right of way[4] for the 1967 distribution line included some combination of poles and guy wires totalling 13, for which the Band received one-time compensation of $195 at the rate of $15 per pole and guy wire. As with the 1959 permit, the rights granted to Calgary Power under section 28(2) of the *Indian Act* were "for such period of time as the said right of way is required for the purpose of an electric power transmission line."

Finally, in 1969, Calgary Power installed a third line across the Alexis Band's reserve to convey electricity from the company's plant at Wabamun, Alberta, to Slave Lake, Alberta. This line differed from the earlier two because, as a transmission rather than a distribution line, its sole purpose was to transfer power *across* the reserve rather than to distribute electricity to buildings and other facilities on the reserve or in its immediate vicinity. It also differed in that, rather than being granted by virtue of a permit under section 28(2) of the *Indian Act*, the right of way was authorized under expropriation provisions in both the company's enabling legislation as well as the expropriation provisions in section 35 of the *Indian Act*. The Band received a single lump sum payment of $4,296 in compensation at the rate of $100 per acre for the 150-foot right of way "for such period as the said lands are required for a right-of-way for power transmission line purposes," and band members were paid at the rate of $300 per acre to clear the required land.

The location of IR 133 is found on Map 1 and the position of the three power lines is depicted on Map 2 in this report (see pages 2 and 12).

In a statement of claim submitted to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) on October 4, 1995, with a request that the claim be "fast tracked,"[5] the Alexis First Nation contended that Canada failed to protect the interests of the "vulnerable and dependent" Alexis people in each of the three transactions. With regard to the 1969 transmission line, the First Nation contended that DIAND breached a number of fiduciary obligations and the First Nation objected to Canada's perceived failure to insist on annual payments for the right of way granted to Calgary Power. The result of these failures by Canada, according to the First Nation, was that "Alexis failed to achieve fair and reasonable value for use of their Indian Reserve by [Calgary Power]," and that it has "lost, and continues to lose, substantial revenues which, in the ordinary course of cautious and prudent conduct and advice by a reasonable and informed trustee, would have, or ought to have, been obtained for a beneficiary in similar circumstances."[6]

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[4] "Sketch Plan Showing Proposed Right-of-Way of Power Line for Calgary Power Ltd.," January 11, 1967 (ICC Exhibit 10, p. 186).

[5] Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, to Manfred Klein, Specific Claims West, DIAND, October 4, 1995.

At about the same time, the First Nation approached TransAlta with a view to levying annual charges against the company under a term of the 1969 permit requiring Calgary Power to "pay all charges, taxes, rates, and assessments whatsoever payable by the Grantee [Calgary Power] or any occupant of the right of way which shall, during the continuance of the rights hereby granted, be due and payable or be expressed to be due and payable in respect of the works or use by the Grantee of the right-of-way." In a Band Council Resolution (BCR) dated September 19, 1995, the First Nation retroactively claimed charges of $4,000 per year from 1970 to 1980, $5,000 per year from 1980 to 1990, and $6,000 per year from 1990 to 2000. It further directed its counsel to take "all necessary steps against Canada and TransAlta Utilities [to] ensure collection of the annual charges."[7]

On October 23, 1995, however, Wolfgang Janke, TransAlta's vice-president of customer services, replied that, under the terms of the 1969 permit, it was not open to the First Nation to impose new charges in the manner proposed. Janke indicated the company's willingness to consider paying taxes or making payments in lieu of taxes, but he rejected any suggestion that the company would make any such payments on a retroactive basis.[8] Counsel for the First Nation forwarded Janke's letter to Manfred Klein of Specific Claims West (SCW) on November 29, 1995, with a request that it be added to the First Nation's October 1995 statement of claim. Counsel contended that, because the First Nation had little or no prospect of recovering its losses from TransAlta, it would be seeking full compensation from DIAND.[9]

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[6] Alexis First Nation, "Statement of Claim re Breach of Crown's Fiduciary and Statutory Duty in Granting Right-of-Way to Calgary Power for Electrical Power Transmission Lines on Alexis Indian Reserve #133," October 1995, pp. 9–10 (ICC Exhibit 1).

[7] Alexis First Nation, Band Council Resolution 95-96/133-3-6-20, September 19, 1995 (ICC Exhibit 1, pp. 38–39).

[8] Wolfgang Janke, Vice-President, Customer Services, TransAlta Utilities Corporation, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, October 23, 1995 (ICC Exhibit 2, pp. 3–4).

Following the release of the Supreme Court of Canada's decision in the *Apsassin* case,[10] Alexis First Nation on April 23, 1996, tendered a further supplement to its earlier submissions. Counsel urged federal negotiator Al Gross of Specific Claims West to conclude, based on *Apsassin*, that "DIAND must act as a reasonable, prudent, and well informed person in similar circumstances to ensure any land dealings were on terms in the Indians' best interest." Counsel further contended that, given "the permanent or very long term loss of their land," the Alexis people should have been compensated not only for the installation of pylons and associated clearing costs but also on an ongoing basis for the loss of use of the property involved; moreover, they should have been advised at an early date that they could obtain further annual payments in the form of taxes or payments in lieu of taxes. Counsel argued that Canada had further failed to meet its "continuing obligation and opportunity throughout the 27-year duration of the easement to correct this mistake or inadvertence."[11]

In the meantime, Specific Claims West undertook confirming research regarding the First Nation's submission and prepared an historical report dated April 29, 1996 (the SCW Report) in preparation for a legal review of the claim by the Department of Justice.[12] This report was forwarded to counsel for the First Nation for "review and analysis," and on August 11, 1996, counsel advised

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[9] Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, to Manfred Klein, Specific Claims West, DIAND, November 29, 1995 (ICC Exhibit 2, p. 2).

[10] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344. This decision is commonly referred to as the *Apsassin* case.

[11] Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, to Al Gross, federal negotiator, Specific Claims West, DIAND, April 23, 1996 (ICC Exhibit 3, pp. 1–3).

[12] "Alexis Powerline Easement Claim," prepared at the request of Specific Claims West, April 29, 1996 (ICC Exhibit 4). The source of this report is unclear. The author refers to himself or herself as "the Consultant," and the report itself states that it was "prepared at the request of Specific Claims West and does not necessarily reflect the views of the Government of Canada." However, in a letter dated December 9, 1996, in response to the First Nation's request for funding to respond to the report, Donna Reid-Daly of Indian Affairs referred to the document as "the historical report prepared by the Specific Claims Branch concerning the Alexis Indian Band's TAU [TransAlta Utilities] Right-of-Way claim": Donna Reid-Daly, Research Funding Division, Claims and Indian Government, DIAND, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, December 9, 1996 (ICC file 2108-1-2, vol. 1).

Canada that, in his opinion, the report confirmed Indian Affairs' breach of its "lawful and fiduciary obligation to the First Nation." Given his view that the compensation owed to the First Nation amounted to less than $500,000, he reiterated the First Nation's request that the claim be "fast tracked."[13]

In succeeding months, however, the review of the claim by Canada was repeatedly delayed. After being informed that there would be a "delay of an undetermined amount of time" in processing the claim, counsel for the First Nation on August 21, 1997, submitted his first request to the Indian Claims Commission (the Commission) that it deem Canada to have rejected the claim so that an inquiry could be commenced. In December 1997, Canada contracted with Public History Inc. (PHI) to undertake and complete additional research by June 15, 1998.

In the meantime, to protect its legal position, the First Nation commenced an action in the Federal Court of Canada, Trial Division, on June 10, 1998, having previously informed DIAND that, should the claim be validated, the First Nation would suspend the litigation. Nevertheless, although PHI's research had been nearing completion, Canada elected to suspend further review of the claim under the Specific Claims Policy while the matter remained "active" before the courts. Preparation of the research report did not resume until March 1999 when, after Canada informed the First Nation of its reasons for suspending work on the file, counsel for the First Nation obtained an order of the Federal Court placing the litigation in abeyance. Even after this step was taken, however, Canada's progress on the file continued to lag.

Finally, after repeated requests by the First Nation to Canada to disclose the status of the research report and to the Commission to request that the claim be deemed to have been rejected, the Commission on October 27, 1999, accepted the First Nation's request for an inquiry. On January 4, 2000, Paul Girard, Director General of the Specific Claims Branch, informed the Commission that "the claim has not yet been rejected by the Specific Claims process, and therefore, the Indian Claims Commission is not in a position to review the file." He added that PHI's research report had been completed and, following review by the First Nation, it would be forwarded to the

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[13] Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, to Al Gross, federal negotiator, Specific Claims West, DIAND; Michel Roy, Director General, Specific Claims Branch, DIAND; and Karen Allen, Director of Research, DIAND, August 11, 1996 (ICC Exhibit 5).

Department of Justice; only after review by that department would DIAND be in a position to provide the First Nation with Canada's preliminary position on the claim.[14] In subsequent correspondence dated February 7, 2000, to the Commission's Senior Legal Counsel Kathleen Lickers, Robert Winogron, counsel with DIAND Legal Services, challenged the Commission's jurisdiction to inquire into the matter since the First Nation's claim had not yet been rejected by the Minister and the Commission's enabling legislation permitted it to inquire into and report on a claim only following such a rejection.[15]

The Commission prepared a documentary brief relating to the First Nation's allegations of delay, and distributed it to the parties on February 25, 2000. The parties agreed that the Commission would consider the challenge to its mandate on the basis of the documentary brief and supplementary filings.[16] Ultimately, the Commission issued its interim ruling on April 27, 2000, concluding, first, that the words "already rejected by the Minister" can include circumstances in which Canada's conduct is tantamount to a rejection, and, second, that Canada's conduct in the present circumstances constituted just such a rejection. The Commission thus concluded that it had authority to proceed with its inquiry to review the claim.[17] The full text of the Commission's interim ruling is attached to this report as Appendix A.

In the wake of this decision, Paul Girard advised Kathleen Lickers on July 21, 2000, that Canada was not in a position "to either assert that this claim has been appropriately rejected in accordance with the Specific Claims Policy, or that this claim can be accepted in accordance with the Policy." He added that it would be impossible for Canada to participate in the inquiry except as an observer, and that for this reason it would not be providing documentation to the Commission for the purposes of the inquiry. He undertook, however, to provide continuing updates on the status of Canada's legal review.[18]

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[14] Paul Girard, Director General, Specific Claims Branch, DIAND, to David Osborn, Commission Counsel, ICC, January 4, 2000 (ICC file 2108-1-2, vol. 1).

[15] Robert Winogron, Counsel, DIAND Legal Services, to Kathleen Lickers, Senior Legal Counsel, ICC, February 7, 2000 (ICC file 2108-1-2, vol. 1).

[16] David E. Osborn, Commission Counsel, ICC, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Robert Winogron, Counsel, DIAND Legal Services, March 16, 2000 (ICC file 2108-1-2, vol. 1).

[17] ICC, *Interim Ruling: Alexis First Nation – TransAlta Utilities Right-of-Way Inquiry, Ruling on Government of Canada Objections*, April 27, 2000 (ICC file 2108-1-2, vol. 1).

As the inquiry progressed, the Commission conducted a planning conference in Edmonton on July 28, 2000, and scheduled the exchange of written submissions between the parties by December 7, 2000.[19] However, the federal election of November 27, 2000, intervened, prompting counsel for Canada to seek an adjournment to permit it to obtain fresh instructions once the new government was in place. With the consent of the First Nation, the delivery of written submissions was adjourned to early 2001, with oral arguments scheduled for February 27, 2001.[20]

On January 29, 2001, however, Canada formally rejected the First Nation's claim. Assistant Deputy Minister W.J.R. Austin responded point by point to the Alexis submissions, denying that the compensation paid to the First Nation was inadequate, that Canada had failed to satisfy any fiduciary obligations it may have had with respect to the negotiations between Calgary Power and the Band, or that Canada had any obligation to advise the Band of its taxation or other powers under the *Indian Act*.[21] The full text of Austin's letter is attached to this report as Appendix B. With the arrival of this letter, the Commission granted the First Nation an adjournment to allow it to address Canada's position in its written submissions.

At the same time, the First Nation's litigation in the Federal Court of Canada, placed in abeyance by order of Lemieux J on March 11, 1999, came up for a status review by the court on February 16, 2001. On February 9, 2001, to allow the First Nation to meet its February 16 deadline in court, the Commission issued its oral decision to proceed with the inquiry notwithstanding its understanding that the First Nation was in the pleadings stage of litigation in the Federal Court. The parties subsequently asked the Commission to provide written reasons for its decision, and it did so on March 9, 2001. The Commission's interim ruling is attached to this report as Appendix C.

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[18] Paul Girard, Director General, Specific Claims Branch, DIAND, to Kathleen Lickers, Senior Legal Counsel, ICC, July 21, 2000 (ICC file 2108-1-2, vol. 1).

[19] Kathleen N. Lickers, Senior Legal Counsel, ICC, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Carole Vary, DIAND Legal Services, October 4, 2000 (ICC file 2108-1-2, vol. 1).

[20] Kathleen N. Lickers, Senior Legal Counsel, ICC, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Carole Vary, DIAND Legal Services, November 2, 2000 (ICC file 2108-1-2, vol. 1).

[21] W.J.R. Austin, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Francis Alexis, Alexis First Nation, January 29, 2001 (ICC Exhibit 12B, pp. 1–8).

Despite Canada's difficulty in deciding how to proceed in light of this decision, the Commission continued with the inquiry, first meeting with elders Nelson Alexis, Phillip Cardinal, former Chief Howard Mustus, and current Chief Francis Alexis on May 31, 2001, to obtain "willsay" statements regarding the evidence likely to be forthcoming in the community session. The Commission provided the parties with an unofficial transcript of the elders' recorded statements on July 12, 2001. With the community session and oral submissions tentatively scheduled for September 26 and 27, 2001, in Edmonton, the Commission contacted counsel for both parties on September 5, 2001, to confirm that they were willing and able to proceed.[22] Counsel for Canada responded that the government would not participate in the inquiry as long as the First Nation insisted on actively pursuing its litigation instead of placing the Federal Court action in abeyance.[23] Eventually, counsel for the First Nation agreed to place the litigation in abeyance pending the delivery of the Commission's final report.

The community session took place at the Alexis reserve on December 5, 2001; the First Nation filed its written submissions on May 24, 2002; Canada filed its written submissions on July 16, 2002; and the First Nation filed reply submissions on July 31, 2002. The oral hearing of the parties took place in Edmonton on August 20, 2002.

A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix D of this report.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[24] This Policy, outlined in the Department of Indian Affairs and Northern Development's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[25] The term "lawful obligation" is defined in *Outstanding Business* as follows:

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[22] Kathleen N. Lickers, Commission Counsel, ICC, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Carole Vary, DIAND Legal Services, September 5, 2001 (ICC file 2108-1-2, vol. 2).

[23] Carole Vary, DIAND Legal Services, to Kathleen N. Lickers, Commission Counsel, ICC, September 10, 2001 (ICC file 2108-1-2, vol. 2).

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[26]

The Commission has been asked to inquire into and report on whether the Alexis First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

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[24] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[25] DIAND, *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994), 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

[26] *Outstanding Business*, 20; reprinted in (1994), 1 ICCP 171 at 179–80.

PART II

HISTORICAL BACKGROUND

TREATY 6 AND THE CREATION OF IR 133

In August and September 1876, Canada sent Treaty Commissioner Alexander Morris, the Lieutenant Governor of Manitoba and the North-West Territories, together with fellow Commissioners James McKay and W.J. Christie to meet at Fort Pitt, Fort Carlton, and Battle River with "the Plain and Wood Cree and the other Tribes of Indians" to negotiate Treaty 6. From Canada's perspective, the purpose of the treaty was to open up the 121,000-square-mile Treaty 6 area for settlement, immigration, and other purposes and to establish "peace and good will" between the Indians and the government. In exchange for the Indians' surrender of their rights to this territory, Canada agreed, among other things, to "lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families."[27] The treaty continued:

> Provided, however, that ... the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; ...
>
> It is further agreed between Her Majesty and Her said Indians, that such sections of the reserves above indicated as may at any time be required for public works or buildings, of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.[28]

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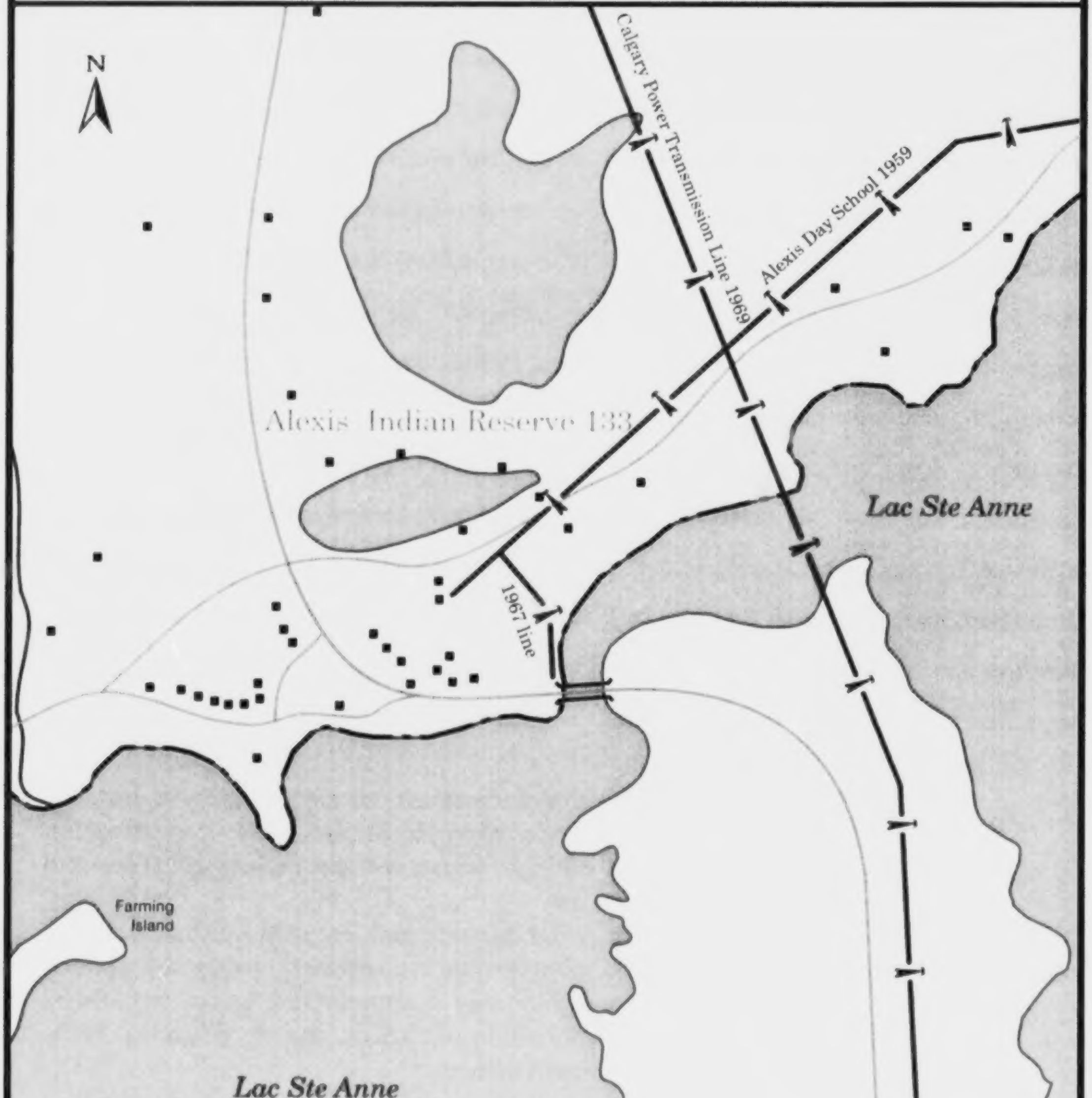
[27] Canada, *Indian Treaties and Surrenders*, vol. 2 (Saskatoon: Fifth House Publishers, 1993), 35–37 (ICC Exhibit 10, p. 2).

[28] Canada, *Indian Treaties and Surrenders*, vol. 2 (Saskatoon: Fifth House Publishers, 1993), 37 (ICC Exhibit 10, p. 2).

Map 2


N
Calgary Power Transmission Line 1969
Alexis Day School 1959
Alexis Indian Reserve 133
1967 line
Lac Ste Anne
Farming Island
Lac Ste Anne

The following year, on August 21, 1877, in the presence of interpreter Peter Erasmus and three other witnesses, Chief Alexis Kees-kee-chee-chi and Headman Oo-mus-in-ah-soo-waw-sinee executed an adhesion to Treaty 6 on behalf of the ancestors of the present-day Alexis First Nation.[29]

To fulfill the Crown's obligations to provide reserve land, Dominion Land Surveyor George A. Simpson laid out IR 133 on the north shore of Lac Ste Anne for the Alexis Band in October 1880. Comprising 23 square miles, the reserve was confirmed by federal Order in Council PC 1151 on May 17, 1889,[30] and withdrawn from the operation of the *Dominion Lands Act* on June 12, 1893, by Order in Council PC 1694.[31]

THE 1959 DISTRIBUTION LINE

The events of primary interest in this inquiry did not begin to unfold until the mid-1950s. In 1953, planning began for the new Alexis Indian Day School situated in the SE 11-55-4-W5M. In addition to a two-classroom building to be erected near the north shore of Lac Ste Anne, the plans included the drilling of a well because the lake water was not suitable for drinking. Concurrent plans for an upgraded school on the nearby Wabamun reserve of the Paul Band called for that building to be wired in preparation for electrification since power lines already ran within a mile of the existing building on that reserve, but no such intentions were expressed for the Alexis school at that time.[32] On May 26, 1954, the Alexis Indian Day School officially opened.[33]

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[29] Canada, *Indian Treaties and Surrenders*, vol. 2 (Saskatoon: Fifth House Publishers, 1993), 44–45 (ICC Exhibit 10, p. 7).

[30] Canada, Order in Council PC 1151, DIAND, Indian Land Registry, Registration No. B4000 (ICC Exhibit 10, pp. 8–12).

[31] Canada, Order in Council PC 1694, DIAND, Indian Land Registry, Registration No. 1151-6 (ICC Exhibit 10, pp. 13–17). The Commission is not deciding in this report whether Simpson's survey of IR 133 satisfied Canada's obligation to provide land under Treaty 6.

[32] G.H. Gooderham, Regional Supervisor of Indian Agencies, Indian Affairs Branch, Department of Citizenship and Immigration, to Charles H. Buck, Chief, Engineering and Construction Services, Indian Affairs Branch, Department of Citizenship and Immigration, April 25, 1953, National Archives of Canada (hereafter NA), RG 10, vol. 8678, file 774/6-1-007, part 1, reel C-14199 (ICC Exhibit 10, p. 52).

[33] H.N. Woodsworth, Superintendent, Edmonton Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to E.A. Robertson, Acting Regional Supervisor of Indian Agencies, May 5, 1954, NA, RG 10, vol. 8678, file 774/6-1-007, part 1, reel C-14199 (ICC Exhibit 10, p. 51).

By 1958, the Edmonton Agency of Indian Affairs initiated plans to upgrade the school by constructing an additional classroom with a basement, replacing the two existing wood furnaces with an oil-fired hot water heating system, providing new lavatory facilities served by a pump at the existing well and a septic field, and developing existing basement space for industrial arts and home economics programs. Architect H.J. Slawek reported on September 22, 1958, that, as part of the improvements, "Indian Affairs are bringing power to this school this year."[34] Four months later, in a letter to E.A. Gardner, architect with the Public Works Department, Indian Affairs Branch Director H.M. Jones provided additional instructions to be transmitted to the district architect in preparation for the tendering process:

> 1. The existing building is not at present wired for electricity. This should be included in the tendering material now being prepared.
> 2. Electric power will be brought to the site by this Department.[35]

In May 1959, R.F. Battle, Indian Affairs' Regional Supervisor for Alberta and the North-West Territories, informed headquarters that the estimated cost of extending electrical power to the school would be roughly $4,000. He added that this figure had been placed in the estimates for that year and that, although no application for the service had yet been made, power could be expected at the site by September 1, 1959, if application was made immediately.[36]

More concrete figures were supplied by Will Smith, the commercial supervisor, Edmonton Division, for Calgary Power on June 15, 1959. Smith estimated the cost of bringing a 7620-volt line 3¾ miles north from the NE 23-54-4-W5M – "the shortest route" – would be $6,191, including the cost of a transformer. He noted, however, that it would be to the Band's advantage to bring power in from the east because it would provide opportunities to split the costs among a number of consumers:

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[34] H.J. Slawek, Architect, Public Works Department, "Site Investigation Report, Edmonton Agency – Alexis," September 22, 1958, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, pp. 105–6).

[35] H.M. Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, to E.A. Gardner, Chief Architect, Building Construction Branch, Public Works Department, January 23, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 112).

[36] R.F. Battle, Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, May 1, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 114).

> [B]earing in mind the probable development of summer services to the east of the Indian reserve we would build the line extension from Gunn, and of course expecting the summer service customers to pay their proportionate share of the costs....
>
> We would ask your departments to pay a construction contribution of $2500.00.[37]

Battle forwarded this information to the Indian Affairs Branch in Ottawa on June 18, 1959,[38] where it was referred to the Treasury Board and recommended for acceptance by Jones. Noting that Calgary Power was "the only firm in the area capable of performing the work," Jones remarked that "[t]he rates for the supply of electricity will not exceed the established rates charged other comparable consumers in the locality." He mistakenly added that the line would be run a distance of 3¾ miles, clearly referring to the length of line required had it been brought in from the south rather than from the east as the proposal actually contemplated.[39] Nevertheless, by Treasury Board Minute 551195 dated July 2, 1959, Calgary Power's tender to construct the line was accepted.[40]

The next step to be addressed was obtaining authority from the Band for Calgary Power to erect its power line within IR 133. At the time, there were three means by which this could be accomplished. The first was a permit under section 28(2) of the 1952 *Indian Act*, which stated:

> [**28**](2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any

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[37] Will Smith, Commercial Supervisor, Edmonton Division, Calgary Power, to G.S. Lapp, Superintendent, Indian Affairs Branch, Department of Citizenship and Immigration, June 15, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 115).

[38] R.F. Battle, Regional Supervisor – Alberta and North-West Territories, to Indian Affairs Branch, June 18, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 117).

[39] Department of Citizenship and Immigration, "Authority to Enter into Contract, Details of Request to the Honourable the Treasury Board," June 24, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 118).

[40] Department of Citizenship and Immigration, Indian Affairs Branch, "Authority for Expenditure," July 9, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 119).

> longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.[41]

In a *Land Management and Procedures Manual* issued in 1983, Indian Affairs remarked that permits under section 28(2) were "appropriate for rights-of-way for utility distribution power lines serving users on a Reserve" and "to facilitate access within the Reserve" but "not for the purpose of crossing through the Reserve." The manual added that an interest granted under section 28(2) could not be "exclusive to the permittee."[42] As the legislation indicated, any such interest of longer than one year in duration required the approval of both the Band Council and the Minister responsible for Indian Affairs. According to the PHI report, permits under section 28(2) represented the most common means by which public utility easements were created across Indian reserves, with the form of the document ranging from "a simple letter" to a formal legal agreement between the Minister and the company involved.[43]

The second method by which authority might be granted to Calgary Power to occupy and use a right of way within IR 133 was under the expropriation provisions in section 35 of the 1952 *Indian Act*. Section 35 stated:

> **35**(1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.

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[41] *Indian Act*, RSC 1952, c. 149, s. 28(2), as amended by SC 1956, c. 40, s. 10.

[42] DIAND, Lands Directorate, Reserves and Trust, *Land Management and Procedures Manual*, September 1983 (ICC Exhibit 7, pp. 68–69).

[43] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 27 (ICC Exhibit 6, p. 27).

> (3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.
>
> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).[44]

It appears to be agreed between the parties to this inquiry that, at all material times, Calgary Power was a corporation with powers of expropriation as contemplated by section 35(1) of the 1952 *Indian Act*. The authority of corporations such as Calgary Power to expropriate was set out in *The Water, Gas, Electric and Telephone Companies Act* of Alberta.[45]

The 1983 *Land Management and Procedures Manual* suggests that the expropriation provisions were appropriate in circumstances differing from those intended by section 28(2):

> Section 35 of the Indian Act should only be resorted to when a provincial or municipal government body, or any public or private corporation having the power to expropriate, requires Reserve land for a purpose which will, of necessity, involve the *exclusive use* of the land so required. That is, Section 35 generally anticipates the outright transfer of control and administration of the subject lands, although it is possible that something less than such absolute control and administration may be transferred as is the case with easements for public utility purposes.[46]

The manual further suggested that easements under section 35 were for "transmission facilities which go from a point outside the Reserve, through the Reserve to another point outside the Reserve and which provide little or no service to the Reserve itself." Examples of the types of transmission facilities requiring authorization under section 35 were "aerial easements for high tension transmission lines, underground easements for pipelines, water lines and gas lines."[47] By the terms of section 35, rights of way of this sort, despite being relatively exclusive in terms of use and typically granted for lengthy periods of time if not in perpetuity, required only the approval of the Governor in Council and not band consent. However, according to government researcher Vivian Little, it appears that, in the 1950s, Indian Affairs began obtaining band council consent before submitting expropriations for approval by the Governor in Council, the only exception being cases in which the national interest was paramount.[48]

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[44] *Indian Act*, RSC 1952, c. 149, s. 35.

[45] *The Water, Gas, Electric and Telephone Companies Act*, RSA 1955, c. 361, ss. 30-33, as amended by SA 1956, c. 60, s. 4.

[46] DIAND, Lands Directorate, Reserves and Trust, *Land Management and Procedures Manual*, September 1983 (ICC Exhibit 7, p. 57). Emphasis added.

PHI comments that, in these early years, before the policies for granting utility rights of way were reviewed in the late 1960s, there were certain common features to rights issued under both section 28(2) and section 35:

> With both Section 28(2) permits and Section 35 takings, the compensation for the easement, if any, was paid to the band (and in some cases to band members for improvements and locatee interests) in a lump sum without provision for annual rentals or periodic review of compensation. In cases where the easement provided a benefit to the band, for instance, electric power or telephone service, nominal compensation was often paid to the Band. Reversionary rights in favour of the Band, should the land no longer be required for a right of way, were uncommon.[49]

The third way in which authority could be granted to Calgary Power to erect and maintain its power lines on IR 133 in 1959 was by virtue of the surrender provisions set forth in sections 37 through 41 of the 1952 *Indian Act*.[50]

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[47] DIAND, Lands Directorate, Reserves and Trust, *Land Management and Procedures Manual*, September 1983 (ICC Exhibit 7, pp. 70–71).

[48] Vivian Little, "Guidelines on Expropriations," March 1994 (ICC Exhibit 7, pp. 7–9).

[49] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 28 (ICC Exhibit 6, p. 28).

[50] *Indian Act*, RSC 1952, c. 149, ss. 37–41, as amended by SC 1956, c. 40, s. 11.

The surrender provisions permitted a surrender that was absolute or qualified, conditional or unconditional. They were attractive in terms of the greater certainty afforded by obtaining the consent of the entire band to a disposition of rights within a reserve. However, the stringent technical requirements of those provisions meant that the required consent could be more difficult and time-consuming to obtain than the relatively more streamlined authorizations by the band council alone under section 28(2) and – in practice although not required by law – under section 35. The surrender provisions were not utilized to grant any of the rights of way at issue in this claim.

On October 21, 1959, the question of the right of way for Calgary Power's electrical power distribution line to the upgraded Day School was considered by the Alexis Band Council. There is no evidence before the Commission regarding the nature of the discussions between the Band Council and Calgary Power or the involvement, if any, of representatives of Indian Affairs on the Band's behalf. Nevertheless, the Band Council authorized the right of way by means of a resolution, executed by Councillors John Cardinal, Willie Lefthand, and Paul Kootenay, that stated:

> THAT CALGARY POWER CO. LIMITED be granted an easement thirty feet in width for a power line to extend from the east side of Alexis Reserve between Sections 7 and 18, Township 55, Range 3, West 5th and Section 12 & 13, Township 55, Range 4 West of the 5th for approx 7/8th of a mile, thence in a southwesterly direction to the school located in S.E.¼ Section 11, Township 55, Range 4, West of the 5th Meridian; this distance being approximately one mile, making a total distance through the Reserve of 1, 7/8th miles; with the following conditions:
>
> 1. That members of Alexis Band be employed to brush right-of-way.
> 2. That no payment be made to Alexis Band Funds for this easement.[51]

Of note in this BCR are the clause foregoing the payment of compensation for the easement, the stipulation requiring Calgary Power to employ band members to clear the right of way, and the absence of any term defining the length of time during which the right of way and associated rights would remain in effect. Moreover, because the right of way had been authorized by the Band Council rather than the entire Band, the permit could not be issued under the surrender provisions of the

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[51] Alexis Band, Band Council Resolution, October 21, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 124–25).

Indian Act, but the resolution also makes no mention of whether it would be issued pursuant to section 28(2) or section 35. Nevertheless, J.R. Wild, the Superintendent of the Edmonton Indian Agency, forwarded the resolution to Regional Supervisor Battle on October 23, 1959, with a recommendation that the Indian Affairs Branch approve it.[52]

During the community session in this inquiry, elders Howard Mustus, Phillip Cardinal, and Chief Francis Alexis spoke of the process by which the Band Council authorized the use of the 1959 and subsequent rights of way. Howard Mustus commented:

> As I spoke this morning to one of the elders and I was asking him about a number of concerns including this one here, and to his knowledge, the process did not allow for the consent of the peoples of the First Nations of Alexis during these times. Instead, what happened was it was the Indian agent on behalf of the Federal Crown acting mainly to satisfy, in this case, Trans-Alta where there was already a preconceived agreement that was made and the Indian agent's responsibility was to round up the leadership and go through the motions of consent.
>
> There is no record or no awareness in our community whether there was a referendum held to consent, to approve of those specific facilities coming and establishing. I think all that was claimed was that it was going to be a benefit to the membership if electricity was brought in. But at no time was there any explanation of the loss of uses to those right-of-ways. There was no explanation of any kind what the future implications of the decision that was made of those players of that day.[53]

Chief Francis Alexis added:

> [T]hat first phase of power in 1959, at that time my dad was Chief and he didn't know how to read and write. And I remember at that time I don't think we had legal representation or anything, just based on what the Indian agent said.[54]

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[52] J.R. Wild, Superintendent, Edmonton Indian Agency, to R.F. Battle, Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, October 23, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2 (ICC Exhibit 10, p. 126).

[53] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 14–15, Howard Mustus).

[54] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 19, Chief Francis Alexis).

Similarly, Phillip Cardinal remarked:

> We didn't have that kind of expertise to tell us, you know, it's worth this much or anything like that. There was no lawyers or no kind of consultants around to really advise us on that or advise on leadership or anything like that.[55]

These comments from the First Nation's elders echo a report in which the Superintendent of the Edmonton Agency, in discussing the development of band councils within the agency in 1966, wrote:

> It is evident that the Enoch Band Council is fairly capable of operating more independently, where as, Alexis, Alexander, Paul and Beaver Lake Councils still require considerable guidance and will do so for some time.[56]

Within two weeks of the BCR, W.C. Bethune, Chief of Reserves and Trusts, advised his counterpart in the Education Division on November 2, 1959, that the requested easement would be granted to Calgary Power.[57] Four days later, Bethune forwarded three copies of a permit to Battle to be signed by Calgary Power under seal and returned to Ottawa for execution by the Minister. Bethune noted that "[t]he permit is made in consideration of the nominal sum of $1.00 which it is not necessary to collect."[58] He also acknowledged receipt of "the application by Calgary Power Limited for a power line right-of-way on Alexis Indian Reserve No. 133 to serve the Alexis Indian

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[55] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 35, Phillip Cardinal).

[56] Superintendent's Report, Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, March 3, 1966, to September 30, 1966, NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797, p. 3 (ICC Exhibit 10, p. 172).

[57] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to Chief, Education Division, Indian Affairs Branch, Department of Citizenship and Immigration, November 2, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 127).

[58] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.F. Battle], Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, November 6, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 129).

Day School," but PHI notes in its historical report that "no such [application] document has been located."[59]

On December 16, 1959, Battle forwarded the three copies of the permit, duly executed by Calgary Power, to headquarters with a request that they be returned to him for distribution following execution by the department.[60] After the document was recorded as Permit No. 431, Bethune complied with Battle's request, providing him with two fully executed copies of the permit on December 29, 1959, and directing him to provide one to Calgary Power.[61]

The permit, dated November 9, 1959, and expressly issued under section 28(2) of the *Indian Act*, granted Calgary Power (referred to in the document as "the Permittee"), its successors, and assigns the right to construct, operate, and maintain an electric power transmission line on the 30-foot right of way as shown in red on a sketch attached to both the BCR and the permit itself. The permit further provided that the permission granted to Calgary Power was subject to additional stipulations, including the permittee's right of access to the land, the right to cut down trees for safety purposes, subject to reimbursing the Minister, and the following:

> 1. That the rights hereby granted may be exercised by the Permittee for such period of time as the said right-of-way is required for the purpose of an electric power transmission line.
> 2. That the Permittee shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the

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[59] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999 (ICC Exhibit 6, p. 4). By way of comparison, Calgary Power's brief one-page letter in application for a 150-foot right of way through the Wabamun reserve of the Paul Band in 1961 is included in the supporting documentation with the PHI report (ICC Exhibit 10, p. 152).

[60] R.F. Battle, Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, December 16, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 136).

[61] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.F. Battle], Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, December 29, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, 137).

> said electric power transmission line or the use by the Permittee of the said lands.[62]

In short, the permit granted Calgary Power an interest for as long as the right of way would be required for power line purposes. That interest included the right to remove trees and "to do all such other acts and things as may be necessary or requisite for the purpose of properly erecting, operating, maintaining and patrolling the said electric power transmission line." As PHI remarks in its historical report, the permit did not incorporate the condition in the BCR stipulating that band members be employed to "brush" or clear the right of way, nor is there documentary evidence or clear oral testimony to indicate whether band members actually were employed to do so.[63]

Moreover, neither the BCR nor the permit specifies the area of the right of way, although it was identified as being 30 feet in width and approximately 1⅞ miles in length. Nine years later, on January 10, 1968, when Indian Affairs was considering the survey of the 1967 extension of the 1959 power line and questioning whether the 1959 line should be formally surveyed at the same time, Calgary Power's land agent, S.C. Johnson, explained why the earlier right of way had never been surveyed and why, in the company's view, it should remain unsurveyed:

> The line in question was constructed to serve the school on the Reserve and a portion of the cost of the line was paid by Indian Affairs. If a legal survey would have been required at that time the cost to Indian Affairs would have been greater. For this reason an easement was granted on a sketch plan (file 110/31-3-3).
>
> In view of this we question whether a legal survey of the right-of-way would be of sufficient advantage to warrant the cost involved.[64]

Finally, the permit obliged Calgary Power to "pay all 'charges, taxes, rates and assessments'" whatsoever that might be or "be expressed to be" due and payable in relation to the power line or

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[62] Agreement between Her Majesty the Queen, represented by the Minister of Citizenship and Immigration, and Calgary Power Ltd., November 9, 1959, DIAND, Indian Land Registry, Registration No. R11437 (ICC Exhibit 4, pp. 34–36).

[63] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999 (ICC Exhibit 6, p. 4).

[64] S.C. Johnson, Land Agent, Calgary Power Ltd., to T.A. Turner, District Supervisor, Indian Affairs Branch, DIAND, January 10, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 257).

Calgary Power's use of the right of way during the term of the permit. However, as the April 1996 SCW report observes, "[n]o evidence has been located that would indicate that any charges other than the expressed consideration of one dollar were ever levied or assessed on the utility by the Crown."[65]

THE 1967 DISTRIBUTION LINE EXTENSION

On April 4, 1966, the Alexis Band issued another Band Council Resolution, this one relating to the proposed extension of Calgary Power's 1959 distribution line. The record before us includes no evidence regarding the nature of the discussions between the Band and Calgary Power or the involvement, if any, of Indian Affairs in those discussions. The resolution, signed by Chief Willie Lefthand and Councillors Lawrence Mustus, Mike Paul, J.B. Mustus, and John Cardinal, stated:

> That the Alexis Band Council grant Calgary Power Ltd. an easement from near John Cardinal to the Lake shore and along the Lake to the Bridge.
>
> Calgary [Power] Ltd. aggree [sic] to pay $15.00 per pole & $15.00 per guy wire.[66]

As the PHI report suggests, the BCR provided for fixed compensation for each pole and guy wire but it did not state the number of poles and guy wires to be installed.[67] Moreover, unlike the 1959 BCR, the 1966 document made no provision for band members to clear the proposed right of way.

The Acting Supervisor of the Edmonton Indian Agency, N.M. McGinnis, forwarded the BCR to R.D. Ragan, Indian Affairs' Regional Director for Alberta, on April 26, 1966, with his recommendation that it be approved. McGinnis advised Ragan that the Band Council had met with Calgary Power's Johnson on April 4 and that, "[a]lthough the Resolution is not too specific, the Council has given us their assurance that [it] is in order." He added that "[t]he main purpose of the extension is to provide power to the cottages at West Cove on Lac Ste. Anne."[68] A later memorandum dated February 12, 1968, from J.H. MacAdam, Deputy Administrator of Lands, to Ragan similarly differentiated between "a) the Power Line Right-of-Way *servicing Departmental requirements on the Reserve* and; b) the extension from it servicing cottages along the lake shore."[69]

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[65] "Alexis Powerline Easement Claim," prepared at the request of Specific Claims West, April 29, 1996, p. 7 (ICC Exhibit 4, p. 7).

[66] Alexis Band, Band Council Resolution, April 4, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 166).

[67] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 7 (ICC Exhibit 6, p. 7).

Although some of the evidence, including the PHI report,[70] originally suggested that the cottages at West Cove were part of the reserve, topographical maps compiled by Energy, Mines and Resources Canada appear to situate West Cove on the south side of Lac Ste Anne outside the limits of IR 133. Nevertheless, although the "main purpose" of the 1967 extension, as identified by McGinnis, was to service the cottages at West Cove, it appears that the extension was also used to provide electrical services to the reserve in addition to those already at the Day School. Howard Mustus and Chief Alexis testified that electrification on IR 133 occurred from 1967 to 1969 "right after centennial year,"[71] and that before then band members went to the school to watch television because it was the only place on the reserve with power.[72] Howard Mustus provided further evidence that the 1967 distribution line extension was the means by which electrical services were brought to band members on the reserve.[73] Similarly, the Edmonton-Hobbema District semi-annual report for the six-month period ending September 30, 1967, confirms that contracts were let for the electrification of 55 homes on the Alexis reserve.[74]

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[68] N.M. McGinnis, Acting Superintendent, Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta Indian Affairs Branch, Department of Citizenship and Immigration, April 26, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 167).

[69] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, February 12, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 259). Emphasis added.

[70] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999 (ICC Exhibit 7).

[71] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 17, Howard Mustus and p. 18 Chief Francis Alexis).

[72] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 70, Chief Francis Alexis).

[73] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 76, Howard Mustus).

On receiving the April 4, 1966, BCR and McGinnis's recommendation, Ragan forwarded them to headquarters in Ottawa on May 19, 1966, adding his own recommendation that the resolution be approved "on the understanding that a proper survey of the line will be supplied by Calgary Power Co. Ltd. when the line is completed."[75] Within two weeks, W.P. McIntyre, Indian Affairs' Administrator of Lands, replied that the resolution had indeed received Indian Affairs' blessing. He instructed Ragan to obtain a plan and legal description acceptable to Calgary Power as well as payment of the necessary moneys, at which time Indian Affairs would prepare the formal permit. He added that, "[i]f the Power Company require an easement, it will be necessary that it provide a legal survey plan and description in accordance with the instructions of the Surveyor of Canada."[76]

On November 1, 1966, Ragan forwarded the semi-annual report for the Edmonton Indian Agency for the period ending September 30, 1966.[77] The report noted that electric power had been extended to 12 houses on the Alexis reserve and that the Band planned further electrification during 1967 and 1968.[78] The report did not deal with the specifics of the distribution line extension as set forth in McIntyre's letter of June 1, however, and on November 25, 1966, McIntyre wrote to Ragan to request an update.[79] Although the record contains no evidence of a reply from Ragan to McIntyre, it appears that someone in the Edmonton office corresponded with Calgary Power on December 12, 1966, as Johnson wrote back eight days later enclosing a rough sketch of the proposed line and a cheque for $195, representing payment for 13 poles and guy wires at the $15 rate stipulated in the Band Council Resolution. Johnson apologized for the delay, adding that the legal survey, which he also found had not been done, would be forwarded to Indian Affairs upon completion.[80]

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[74] DIAND, Indian Affairs Branch, Edmonton-Hobbema District, "Semi-Annual Report – April 1/67-September 30/67," NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797 (ICC Exhibit 10, pp. 227–35).

[75] R.D. Ragan, Regional Director - Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, May 19, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 168).

[76] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, June 1, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 169).

[77] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, November 1, 1966, NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797 (ICC Exhibit 10, p. 176).

[78] Superintendent's Report, Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, March 31, 1966 to September 30, 1966, NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797, p. 4 (ICC Exhibit 10, pp. 170–74).

On January 11, 1967, C.H. Weir, a surveyor with the Edmonton firm Stewart Weir Stewart & Watson, wrote to Surveyor General R. Thistlethwaite to obtain instructions for surveying the right of way for the power line extension within the Alexis reserve. Weir also provided a sketch, similar to the one enclosed with Johnson's letter of December 12, 1966, each showing the proposed extension jutting almost perpendicularly to the southeast from the existing 1959 distribution line to the north shore of Lac Ste Anne near the bridge across The Narrow.[81] An official in Thistlethwaite's office noted the existing power line right of way and contacted Indian Affairs to obtain further information, since the short 1967 extension was to be formally surveyed although the longer 1959 line had not:

> Seems illogical that the long power line R/W was not surveyed and the short one has to be surveyed. We will end up with a survey "hanging" in mid air.[82]

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[79] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, November 25, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 177).

[80] S.C. Johnson, Land Agent, Edmonton Division, Calgary Power Ltd., to Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, with attached sketch, December 20, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 178–79).

[81] C.H. Weir, Stewart Weir Stewart & Watson, to R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts, Department of Mines and Technical Surveys, January 11, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, pp. 184–86).

[82] Marginalia by Surveyor General's office on C.H. Weir, Stewart Weir Stewart & Watson, to R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts, Department of Mines and Technical Surveys, January 11, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, pp. 184–86).

Despite these concerns, Thistlethwaite issued survey instructions to Weir on January 31, 1967.[83] Weir delivered the final plan of survey on linen to Thistlethwaite for filing on March 3, 1967.[84] In the course of reviewing the plan, Thistlethwaite routed it through Indian Affairs with a request to be advised of the circumstances of the transaction for which the plan had been prepared and of whether the plan was suitable for that purpose.[85] The request prompted McIntyre to ask Ragan to clarify whether the BCRs of October 21, 1959, and April 4, 1966, concerned the same matter.[86] Ragan referred the inquiry to Turner, the District Supervisor, who replied:

> It would appear that there is some confusion over the two Band Council Resolutions. The resolution dated October 21, 1959, was approving the original power line that entered the Reserve on the east boundary and crossed the Reserve to the Alexis Day School and skating rink. The resolution dated April 4, 1966 was allowing the power company to tap onto this line and cross the Reserve to extend power services to the cottages at West Cove on the southwest shore of Lac St. [sic] Anne.
>
> The attached print is in fact a legal survey of the sketch that was forwarded on January 6, 1967, and no permit [for the extension] has been issued to date.
>
> The permit issued on November 9, 1959, was to cover, as I mentioned in paragraph one, the original power line not the tap.[87]

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[83] R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts, Department of Mines and Technical Surveys, to C.H. Weir, Stewart Weir Stewart & Watson, January 31, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 187–88).

[84] C.H. Weir, Stewart Weir Stewart & Watson, to R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts, Department of Mines and Technical Surveys, March 3, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, p. 192).

[85] R. Thistlethwaite, Surveyor General, Department of Mines and Technical Surveys, to M.B. Downey, Indian Affairs Branch, Department of Citizenship and Immigration, March 13, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, p. 193).

[86] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, March 31, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, p. 194).

[87] T.A. Turner, District Supervisor, Edmonton-Hobbema District, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, April 25, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 202).

Turner attached his own rough sketch of the 1959 distribution line and the 1967 extension for further clarification.[88] Ragan forwarded Turner's "self-explanatory memorandum" and sketch to McIntyre on May 4, 1967.[89]

Armed with this information, J.L. Menard of McIntyre's office responded on May 9, 1967, to Thistlethwaite's inquiry of March 13. Menard advised that Indian Affairs intended to issue a Licence of Occupation pursuant to section 28(2) of the *Indian Act* and that the plan appeared suitable.[90] After Thistlethwaite had reviewed the plan and obtained corrections from Weir, it was given final approval. On August 30, 1967, the plan, recorded in the Canada Lands Surveys Records as Plan 53492, was registered with Alberta's Land Titles Office.

With the exception of the compensation of $195 and the description of the right of way, the permit,[91] prepared by Indian Affairs and issued pursuant to section 28(2) of the *Indian Act*, was identical in all material respects to Permit No. 431 issued in 1959. McIntyre forwarded three copies to Ragan on July 5, 1967, with instructions to have the permit executed by Calgary Power.[92] After Ragan returned the signed copies of the permit to Ottawa on July 25, 1967,[93] McIntyre arranged for its execution by the Assistant Deputy Minister, and it was entered in departmental records as Permit

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[88] "Alexis Reserve 133," undated, showing existing power line to school and skating rink (Band Council Resolution, October 21, 1959) and extension to West Cove (Band Council Resolution, April 4, 1966), Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 202–3).

[89] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, May 4, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 204).

[90] J.L. Menard, Indian Affairs Branch, Department of Citizenship and Immigration, to R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, May 9, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, p. 193).

[91] Agreement between Her Majesty the Queen, represented by the Minister of Citizenship and Immigration, and Calgary Power Ltd., July 4, 1967, DIAND, Indian Land Registry, Registration No. 055615 (ICC Exhibit 10, pp. 212–17).

[92] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, July 5, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 218).

[93] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, to Indian Affairs Branch, July 25, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 220).

No. 2375. He had two fully executed copies of the permit delivered to Ragan on August 9, 1967, for distribution to Calgary Power and the Edmonton-Hobbema Agency office.[94]

McIntyre's Deputy Administrator, J.H. MacAdam, then asked Ragan to find out if the company preferred a single permit for the 1959 and 1967 power lines, adding that, if so, a plan of survey for the 1959 line would be required.[95] Ragan passed this inquiry on to Turner in the Edmonton-Hobbema District office who in turn posed the question to S.C. Johnson of Calgary Power. In his response of January 10, 1968, Johnson asserted that the 1959 line, constructed in part at the expense of Indian Affairs, had been built to serve the Day School, and requiring a legal survey would have simply driven the government's costs higher. He questioned whether the expense of surveying the original 1967 line would be warranted.[96] In a memorandum dated February 12, 1968, to Ragan, MacAdam agreed, confirming that separate permits would be maintained for the 1959 distribution line and the 1967 extension, but advising that it would be necessary to file an amendment to the agreement, revising the description in accordance with the plan of survey for Permit No. 2375.[97]

The Amending Agreement deleted the interim description of the right of way and substituted the legal description provided by Thistlethwaite to McIntyre on October 10, 1967, while stating that "[a]ll other terms and conditions in the said Permit are hereby confirmed and shall remain unchanged."[98] Ultimately, the Amending Agreement was signed by Calgary Power and Canada on

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[94] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, August 9, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 222).

[95] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to R.D. [Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, November 17, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 242).

[96] S.C. Johnson, Land Agent, Calgary Power Ltd., to T.A. Turner, District Supervisor, Indian Affairs Branch, DIAND, January 10, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 257).

[97] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, February 12, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 259).

[98] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., February 12, 1968, DIAND, Indian Land Registry, Registration No. L1117 (ICC Exhibit 10, pp. 262–64).

February 12, 1968;[99] however, there is no indication that the Alexis Band Council, whose consent was required for both the 1959 and 1967 lines, was advised of the amendment or received a copy of the Amending Agreement.

At the Commission's community session on December 5, 2001, the elders were asked to address Canada's contention that the delivery of electrical service to the reserve represented, in and of itself, an important benefit to the Alexis people. Howard Mustus testified that the distribution lines provided a benefit in one sense:

> The '67 hydro subsidiary lines that came into the Reserve were supposed to be a benefit to our people....
>
> Now we can watch TV which other people just took for granted for years and years and years. That was something that was very much welcome in the community. It meant that we didn't have to – rather than go start a fire by the old cars, just plug them in in the morning and off to work.
>
> Yes, it was welcome, and I believe that awareness was created – and as a matter of fact, I think there was, Phillip correct me if I'm wrong, but there was (inaudible) and the initial intent was being served.[100]

Chief Alexis commented, however, that in other respects the lines have provided no lasting benefit to the reserve:

> [B]enefits has to be defined like education-wise, it's not benefitting our kids, recreation-wise, culture-wise, it hasn't benefitted us.
>
> But when you speak of service-wise, Trans-Alta providing us – our homes with electricity for TVs, electric ranges, fridges, appliances, in that way it's [a] benefit. But in – but we pay for those benefits. But other than that, education-wise, economic development wise, the whole community is not benefitting....
>
> The benefits we are enjoying is, yes, we are enjoying TV, electric ranges, fridges, modern appliances, but we pay for it through power bills and utility bills. It's not that it's been provided for us for free.[101]

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[99] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., February 12, 1968, DIAND, Indian Land Registry, Registration No. L1117 (ICC Exhibit 10, pp. 262–64).

[100] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 83–84, Howard Mustus).

[101] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 82–83, Chief Francis Alexis).

In terms of economic benefits to the Band, neither the BCR of April 4, 1966, nor Permit No. 2375 in its original or amended form made any provision for the Alexis people to clear the right of way for the power line or to perform any other work related to the line's installation.

THE 1969 TRANSMISSION LINE

The Policy Context

By 1967, it appears that Canada had started to reconsider its policies regarding the means by which interests in reserves should be granted to third parties, and in particular whether it was appropriate to grant interests that were in effect permits in perpetuity under section 28(2) of the *Indian Act*. The impetus for this review seems to have started in the divisions of Indian Affairs responsible for mineral rights in relation to rights of way granted under the Indian Oil and Gas Regulations, but concerns came to be expressed with regard to other interests as well. On June 7, 1967, G.A. Poupore, Chief of the Lands, Membership and Estate Division, wrote to E.A. Moore, the Supervisor of Minerals in Calgary:

> For any rights-of-way which do not meet the special requirements of the Indian Oil and Gas Regulations Sections 28(2) and 35 [of the *Indian Act*] must be used to grant rights.
>
> A permit for a pipeline right-of-way issued under authority of Section 28(2) will not give the applicant the tenure which it requires. It is a permit only and cannot be issued for an indefinite period such as "as long as required" which in effect is a permit in perpetuity. As a matter of convenience and to avoid the necessity of the applicant having to carry out a proper survey under instructions of the Surveyor General, we have issued permits "during the pleasure of the Minister". This is the only tenure we can grant under Section 28(2). It is realized that some permits have been issued under this Section "for as long as required". It is not our intention to terminate these at this time but no more will be issued and it is expected that these will be converted over a period of time into proper easements.
>
> All easements in perpetuity (as long as required) must be granted pursuant to the provisions of Section 35 of the Act [marginalia: "without surrender"] or by sale or lease following a surrender for that purpose. Inasmuch as there is no intention of adopting the latter method except in extremely special circumstances, Section 35 will

> be the means for granting easements to all bodies holding the power of expropriation in their charter.[102]

Moore's reply focused primarily on the perceived limitations of the Indian Oil and Gas Regulations, but he did address the implications of sections 28 and 35 of the *Indian Act*:

> If it is considered that the main problem in the use of Sec. 28(2) for pipelines is the indefinite tenure "For so long as required" it is pointed out that this could be overcome by use of a definite long term. Even major pipeline contracts and export permits are limited to 20 to 25 year terms. This seems to be mainly a question of settling on an acceptable policy between the Companies and the Branch. ...
>
> Section 35 appears to have been set up primarily to cover expropriation. There are few cases where this would apply in oil and gas development although this could be a problem for a major transmission line such as Trans Canada. There is a natural reluctance to use or imply the use of expropriation in routine applications and documents.[103]

On September 21, 1967, Poupore circulated his memorandum of June 7, 1967, to all regional directors and the Indian Commissioner for British Columbia, advising that it represented "policy to be followed in connection with the granting of easements in future for oil and gas pipelines under Section 35 of the Indian Act where no surrender of title is involved."[104] One week later, Ragan as the Regional Director for Alberta wrote back to confirm the "change in the procedure."[105]

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[102] G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, Department of Citizenship and Immigration, to [E.A. Moore], Supervisor of Minerals, Indian Affairs Branch, Department of Citizenship and Immigration, June 7, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 206).

[103] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, Department of Citizenship and Immigration, to G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, Department of Citizenship and Immigration, June 23, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, p. 210).

[104] G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, DIAND, to All Regional Directors, Indian Commissioner for British Columbia, and Supervisor of Minerals, Indian Affairs Branch, DIAND, September 21, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, pp. 224–25).

[105] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, to G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, DIAND, September 28, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 226).

The Deputy Administrator of Lands, J.H. MacAdam, replied on November 27, 1967, that "following a recent visit from oil company officials we may refer to our Legal Advisor the possibility that there might be further rights to proceed under Section 35 than we had hitherto suspected." He added:

> Insofar as Permits under Section 28(2) and easements under Section 35, we will in future definitely require Band Council Resolutions as in the past, and, within two years of date of permit, plans of Survey acceptable for recording by the Surveyor General of Canada. Easements under Section 35 will not be issued to companies not possessing powers of expropriation in their charters as a general rule until a legal opinion is received.[106]

The following day, Moore issued a wide-ranging discussion paper aimed primarily at the oil and gas industry but identifying general concerns with existing practices in granting interests under sections 28(2) and 35 of the *Indian Act*. He wrote:

> INDUSTRY PROCEDURES AND REQUIREMENTS
>
> a. Indian Minerals Development
>
> ...
>
> Provincial Crown, Freehold and Indian Affairs Branch Policy to date for easements or surface rights-of-way for gathering lines, water disposal lines, etc. requires a single initial payment sufficient to cover damage, severance, inconvenience etc. Annual rentals are not charged except in extremely rare cases. ...
>
> On Indian Reserves the terms for compensation are negotiated between the Band Council and the applicant. In most cases the Indians receive more than the non-Indian land owner. The latter is subject to expropriation procedures if a suitable agreement cannot be made and often cannot drive as hard a bargain as the Indians. Generally the Band Councils insist on use of as much Indian labour as possible and in forested areas line clearing and subsequent line cleanup in usually done by Indians. Because of lack of large scale equipment this often costs the companies more than work done by a general contractor.

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[106] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, November 27, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 243).

> b. Industry Development on Indian Reserves Not Involving Mineral Resources
>
> ...
>
> Compensation for pipeline rights-of-way on Indian Reserves are negotiated between the Company and the Band Council with the advice of the Agency and Minerals Section, as in the case involving the development of Indian Mineral Resources. Usually the Band gets additional benefits in the form of work contracts. During recent years Indian Bands have received more compensation than non-Indians.
>
> ...

PROTECTION OF INDIAN RIGHTS

The protection of Indians seems to revolve around that provision of adequate safeguards to ensure that the Indian Bands will receive sufficient compensation in the form of initial payments and annual rentals and to ensure that future developments on the reserve will not be hampered by the issuance of rights to companies in the form of easements, leases, permits, etc. It is our contention that the Indians should receive compensation which is commensurate with that received by non-Indians under similar circumstances.

No problems exist with respect to the initial payments or annual rentals in accordance with present day practice. Negotiations between Band Councils and companies with the advice of the Agency and Minerals Section staff members generally result in higher payments than those received elsewhere. If provision is made to require the commencement of future annual rentals or increased annual rentals, as the case may be, no problem would exist with respect to normal compensation.

...

LEGAL ASPECTS

...

We are told that serious problems arise from the use of sec. 28(2) of the Act, although this does provide, and has provided for a number of years, a vehicle for issuance of a document which apparently would be accepted by Band Councils, Companies and Lending Institutions. Usually Band Councils have signed resolutions requesting suitable documents to be issued by the Branch without being very specific in the wording of the resolution; however, at the same time being aware of the intent of an application for a lease, easement, right-of-way, etc. Given proper guidance their resolutions could be very specific as to length of primary term, renewals, compensation, etc. This would be a minor problem, however because previous rights have been issued under this section with a minimum of documentation, the resolutions have never had to be specific.

Sec. 35 of the Indian Act might be applicable although there is considerable doubt and very little agreement in the views of about ten different solicitors that the

> writer has been dealing with. Most Bands on the prairies are very adamant on the subject of expropriation of Indian lands. The Stony Band takes the view that the use of this section to issue a permit to cover a negotiated agreement recognizes the right of a company to expropriate or at least apply for expropriation.... Other practical problems arise with this section with respect to whether the Band Council can approve or whether a Band referendum is needed to approve applications under this section....
>
> There appear to be no other suitable sections in the Indian Act for issuance of documents and in view of the serious difficulties with secs. 35, 37, [and] 39 it is strongly felt that sec. 28(2) be used unless some other workable solution is found.

Ultimately, Moore offered the following recommendations, among others:

> (2) Sec. 28(2) should be used until suitable amendments are made to the Act or the new Indian Act is passed.
>
> ...
>
> (5) Long-term contracts should be issued and subject to recommendation No. 6 suitable clauses should be provided to allow review at suitable intervals respecting annual rent, together with relocation in exceptional cases.
>
> (6) A hard look should be taken with respect to the necessity of specifying review periods as to additional terms of compensation. If it is legal and justifiable for a government to pass acts or regulations requiring payments on existing contracts there would be no need to specify review periods....
>
> (7) If clauses related to review of terms are inserted, it is strongly recommended that this be at the discretion of the Minister or delegated authority rather than the Band Council. This would not be met with as much opposition by the companies and since Band Councils are now approving applications for perpetual easements, it should not bother them that the Minister's name is used in order to decrease the length of term or increase compensation.[107]

By February 1968, it appears that the government had decided to continue granting rights over reserve lands using section 28(2) of the *Indian Act*, but subject to certain conditions. In response to an inquiry from H.J. Brown of Alberta Gas Trunk Line Company Limited,[108] MacAdam advised that "[t]he Minister has determined that permits under Section 28(2) of the Indian Act may continue to be issued 'for as long as required,' for petroleum product pipelines." He continued:

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[107] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, DIAND, "Surface Right-of-Entry to Indian Reserves – Petroleum Industry Easements, Rights-of-Way, Access Roads," November 28, 1967, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, pp. 244–54).

> The Minister has also indicated his feeling that the amount of compensation as well as the manner of payment should be reviewed on a periodic basis. Rights-of-way permits to petroleum product carriers under this section of the Indian Act are therefore being granted for so long as required for pipeline purposes, subject to review at regular intervals as to the amount and manner of payment of compensation.[109]

Similarly, in an April 5, 1968, memorandum to Ragan, Moore confirmed that, in their February 12, 1968, meeting with R.G. Young, the Chief of Indian Affairs' Resources and Industrial Division, the three had agreed on permits in perpetuity subject to periodic reviews with provision for arbitration. It was clear, however, that, in addition to the reluctance of the companies to accept this approach, there also were differences within Indian Affairs on the form that the permits should take:

> In Alberta, compensation for easements at present is paid in the form of a single initial payment covering severance, inconvenience and damage and there are few cases where provision has been made for additional compensation or the review of compensation. The wording of the Land Section [of Indian Affairs] therefore sets an industry precedent in that it indicates that additional payment will be necessary for the second period without stating what form the payment will take. Our review was intended to enable us to determine if compensation was necessary in the light of conditions then existing. In other words, had the land values greatly increased and was the right-of-way contributing to a greater severance or inconvenience than was originally expected or was it common at that time to pay an annual rent for pipeline easements. Our wording provided all the protection that one could ever wish. The Land Section wording does not give any additional protection to the Band and merely attempts to tell the Branch that additional compensation will be necessary. It is rather incongruous in fact since the arbitrating body could conceivably determine that no

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[108] H.J. Brown, Land Manager, Alberta Gas Trunk Line Company Limited, to Department of Citizenship and Immigration, March 19, 1968, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 273).

[109] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to H.J. Brown, Land Manager, Alberta Gas Trunk Line Company Limited, March 29, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 276).

> additional compensation was necessary and it is obvious that an arbitrating body would be reviewing the conditions in the light of industry procedures at that time.
>
> ...
>
> There is a strong movement afoot amongst landowners in both Saskatchewan and Alberta to force the companies into payment of annual rents for pipeline easements. This may take a few years before this will come into force, however, it was this reasoning that led us to recommend that a routine review with respect to terms of compensation be made.[110]

Negotiation of the Right of Way for the 1969 Transmission Line

It was in the context of this heightened attention to the nature of the interests being granted to third parties that the intention to build the 1969 transmission line first arose. Unlike the two earlier power lines, the 1969 line was not intended to distribute electricity to IR 133 or its immediate environs; instead, the line was proposed for the sole purpose of transmitting electricity *across* the reserve from Calgary Power's plant south of the reserve at Wabamun, Alberta, to Slave Lake in the north. The line, providing no direct, ongoing benefit to the First Nation, forms, in the words of counsel, "the main focus of this claim."[111]

In a letter dated February 21, 1968, surveyor C.H. Weir provided Surveyor General Thistlethwaite with a sketch of the approximate location of the proposed line through the reserve through sections 11, 14, 23, and 26 of township 55, range 4, west of the 5th Meridian and requested instructions for its survey.[112] According to elder Phillip Cardinal, the land to be traversed by the line was then undeveloped and covered by bush.[113] In a letter dated March 13, 1968, Thistlethwaite advised Weir, among other things, that authority to proceed with the survey was subject to the approval of the Indian Affairs Branch, to be obtained through Turner as District Supervisor in the Edmonton-Hobbema District office.[114]

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[110] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director Alberta, Indian Affairs Branch, DIAND, April 5, 1968, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, pp. 280-81).

[111] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 33, Jerome Slavik).

[112] C.H. Weir, Stewart Weir Stewart & Watson, to R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, February 21, 1968, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, p. 266).

[113] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 88, Phillip Cardinal).

The approval process was already underway. On March 4, 1968, the Alexis Band Council considered the matter and, according to an account of the meeting in the Edmonton *Journal* of the next day,[115] quickly granted its permission for the line. Signed by Willie Lefthand as Chief and Mike Paul, John Cardinal, and Lawrence Mustus as councillors, the Band Council Resolution stated:

> That an easement be granted to Calgary Power Ltd. for the construction of approximately 13 guyed aluminum tower Power line, under the following terms.
>
> 1. That the sum of one-hundred dollars ($100.) per acre for 100 feet right of way be paid for this easement; which will be approximately 41 acres.
> 2. That the cleared right of way be one-hundred & fifty (150) feet wide and shall cross sections 11, 14, 23 and 26 TWP 55 Range 4 W5.
> 3. All clearing shall be done by members of the Alexis Band for $300. per acre for approximately 61 acres.
> 4. The right of way will be for the construction of a Power line only.
> 5. This easement to be granted for as long as the right of way is required for the purpose of Power Transmission lines.
> 6. Land under easement may be used for pasture or agriculture as long as it does not interfere with the lines. Calgary Power to be responsible for any crop or livestock or fire damages resulting from the line operation.[116]

In the *Journal* article, an unidentified official with Indian Affairs applauded the decision-making process by a democratically elected Band Council – described by reporter Alma Keroack as a "fairly recent development" – as "a much better way for these people to govern themselves." He was also quoted as saying: "There are a lot of intelligent men on these reserves, and the policies governing their people are handled much better by an elected band council of interested men."[117] As in the case of the 1959 line and the 1967 extension, the record in this inquiry contains no firm evidence regarding the nature of the discussions between the Band and Calgary Power or the involvement, if any, of Indian Affairs in those discussions. Elder Phillip Cardinal stated that "there was no gathering of any kind by the membership to go over or to view an application that was submitted by anyone, or to vote on like a referendum or anything like that."[118]

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[114] R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, to C.H. Weir, Stewart Weir Stewart & Watson, March 13, 1968, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, pp. 269–70).

[115] Alma Keroack, "Conditions Improve for Indian Reserve – Democratic System Pays off at Alexis," Edmonton *Journal*, March 5, 1968, p. 9 (ICC Exhibit 10, p. 268).

[116] Alexis Band, Band Council Resolution 1967-68/22774-25, March 4, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 267). For reasons unexplained, the Band Council Resolution refers to Willie Lefthand as Chief whereas the account of the Band Council meeting in the Edmonton *Journal* identifies Moses Kootenay as Chief.

Cardinal further testified that J.B. Mustus was the lone dissenting voice on the Band Council as he did not believe the line "would be good for the Band" and would have preferred to have the line go around the reserve rather than across it;[119] other than J.B. Mustus, "nobody really questioned ... what kind of problems [it was] going to create (inaudible) by way of loss of use."[120] None of the elders recalled Indian Affairs providing any appraisal information regarding the value of the land required for the right of way or the costs for Calgary Power to route the transmission line around the reserve rather than through it.[121] The Band Council did not object to the right of way or the compensation provided because the right of way was perceived as an "opportunity to clear the land by hand" and "make a dollar."[122] Elder Nelson Alexis recalled that, because times were hard and most band members were forced to seek employment off the reserve, the opportunity to earn some money clearing the right of way "was kind of, you know, heaven-sent because we didn't have anything here."[123] But he added:

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[117] Alma Keroack, "Conditions Improve for Indian Reserve – Democratic System Pays off at Alexis," Edmonton *Journal*, March 5, 1968, p. 9 (ICC Exhibit 10, p. 268).

[118] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 27, Phillip Cardinal).

[119] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 86–87, Phillip Cardinal).

[120] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 23, Phillip Cardinal).

[121] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 91–92, Chief Francis Alexis).

[122] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 23 and 87, Phillip Cardinal).

[123] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 28–29, Nelson Alexis).

> I'm not even sure if these people understood what they signed and the weight of it was done. Like, there was – I don't think anybody knew that that even was – you know, that land was going to be lost forever....
>
> I think that if our people understood that there were going to be – you know, this time there's going to be a loss to these – to Calgary Power or whatever power that we have today, you know, they would have probably asked a lot more.[124]

On receipt of a copy of Thistlethwaite's survey instructions to Weir, Indian Affairs' Deputy Administrator of Lands, J.H. MacAdam, forwarded a copy to R.D. Ragan, the Regional Director for Alberta, on March 22, 1968, with a request that the matter be discussed with representatives of both Calgary Power and the Band. Since the instructions provided no details regarding the width of the proposed right of way nor the category of power line (distribution or transmission), it appeared to MacAdam that Thistlethwaite's instructions might relate to the 1959 distribution line for which it had already been determined that no survey was necessary.[125] Ragan apparently passed the inquiry on to the District Office because, on March 29, 1968, A.H. Murray, the Acting Officer in Charge, returned a copy of the March 4, 1968, BCR to Ragan with advice that it related to Calgary Power's "high line from their plant at Wabamun to Slave Lake, Alberta." Recommending approval of the resolution, Murray remarked that "[a]ll accounts paid for the right-of-way and for the brushing are considerably higher than those paid to Non-Indian land owners."[126] Ragan forwarded the resolution to Ottawa on April 3, 1968, adding his own recommendation that it "be approved and that the easement be granted to the Calgary Power Company on the understanding that they will forward a proper survey when the line has been completed."[127]

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[124] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 29 and 92, Nelson Alexis).

[125] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, March 22, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 274).

[126] A.H. Murray, Acting Officer in Charge, Edmonton-Hobbema District, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, March 29, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 275).

[127] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, to Indian Affairs Branch, April 3, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 278–79).

On receiving Ragan's memorandum, MacAdam solicited Young's views on April 17, 1968, regarding the right of way, its location, the proposed terms of compensation, and the existing roads and other services crossing IR 133.[128] In his reply of April 24, 1968, Young, who had agreed with Moore and Ragan in February on the advisability of making permits for pipeline rights of way subject to periodic review, identified a number of concerns:

> 1. There is a discrepancy in the figures given in that 41 acres is [sic] required but the Indians are to be paid for clearing 61 acres. No explanation is given.
> 2. We should not grant such an easement under the conditions laid down in Clause 5 of the Band Council Resolution [ie. "for as long as the right of way is required for the purpose of Power transmission lines"]. The Region should provide more substantiation of the rental level and a review clause is needed. Perhaps the circumstances warrant a fairly permanent type of tenure for the line owners. However, there should be an annual rental of at least $5.00 per acre to be reviewed at intervals of not longer than five years, so that we can be assured of fair adjustments to current values and that a bona fide need exists – i.e. that the line is not simply abandoned. We can see no reason why a 20-year term with right to renew and 5-year rental reviews cannot apply here.
> 3. Can provision be made for Indians to derive employment from maintaining the easement clear of brush, etc.
> 4. To what extent and in what ways does this interfere with or affect other facilities on the reserve – eg. roads, etc.
> 5. Does Band now have elect[r]ification and if not, can a deal be made to benefit the Indians re transformer service, etc.[129]

Young's comments were referred for reply to T.A. Turner, by this time the Superintendent in Charge of the Edmonton-Hobbema District. On June 14, 1968, Turner wrote:

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[128] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, Indian Affairs Branch, DIAND, April 17, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 284).

[129] R.G. Young, Chief, Resources and Industrial Division, Indian Affairs Branch, DIAND, to [J.H. MacAdam], Deputy Administrator of Lands, Indian Affairs Branch, DIAND, April 24, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 285).

> This is to acknowledge your letter of April 24, 1968 and the Regional Director's letter of May 6, 1968. We were finally able to meet with Calgary Power Personnel.
>
> Item #1 – Indians were paid to clear big trees outside the right-of-way where [there] was a danger of them falling on the line.
>
> Item #2 – In Alberta it is a standing practice for all Utility companies, pipe line, etc., to make one payment for easement before work starts and not pay annual rental. This is to be considered as a permanent right-of-way.
>
> Item #3 – In the past, Indians have been hired to keep the right of way cleared of brush.
>
> Item #4 – This right-of-way does not interfere with any other utilities on the reserve.
>
> Item #4 [sic] – The reserve is now electrified.[130]

On September 5, 1968, Young wrote to Ragan to express his views regarding the shortcomings of Turner's response:

> The answer given to Item No. 2 is not satisfactory. The standing practise referred to in Mr. Turner's memorandum must change and, in fact, is changing. Attached are copies of draft agreements being introduced for use under Sections 28 and 53 of the Indian Act and you will note that, while the Agreement assures the Company of use as long as required, the terms and conditions of use are reviewed after twenty years.
>
> Naturally there is some resistance from Companies but they will accept these Agreements. Our responsibility is to protect the Indian interest, and this is not being done when permanent alienation is granted for a fixed sum unless a sale is involved.
>
> ...
>
> Where the easement is to provide access to an oil well on Reserve, etc., the ancillary benefits are a consideration. However, where the purpose is only to convey across a Reserve, there are no ancillary benefits and surfact [sic] values must be fully recognized in the same way as any other surface use.
>
> Would you please discuss this matter with those concerned and advise us of your recommendations.[131]

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[130] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, Indian Affairs Branch, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, Indian Affairs Branch, DIAND, June 14, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 286).

[131] R.G. Young, Chief, Resources and Industrial Division, Indian Affairs Branch, DIAND, to R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, September 5, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 292).

In voicing these concerns, Young echoed policy issues that had been raised by MacAdam on June 24, 1968, in relation to a proposal to issue a permit under section 28(2) of the *Indian Act* to permit the same transmission line across the Paul Band's Wabamun IR 133A and 133B. Recently promoted to the position of Administrator of Lands, MacAdam had advised Ragan:

> You may be aware that in continuation of its policy to secure the highest return to the Indian people for rights given up in their Reserves, the Branch prefers to approve the grant of rights to use Reserve land for either a short term at a fixed compensation in line with current land values, or for a long term with a sliding scale of compensation to be determined from time to time by negotiation.
>
> The transaction aforesaid [involving the Wabamun reserves of the Paul Band] is an example of the inequitable situation the aforesaid policy endeavours to eliminate. In this case it is proposed to alienate rights to 52.63 additional acres of Reserve land at compensation which is equitable by today's values for a term that for all intents and purposes is forever. What will the value of the rights be in 10, 20 or 30 years from now?
>
> Since the answer to that question is not readily available, but indications are that it will be something in excess of the value today, future Band Councils of future generations of Indians might reasonably be critical of those who were responsible for saddling them with a situation in which they had no voice and over which they can exercise no control.
>
> It would be preferrable [sic], therefore, if either the term of the grant were shortened to some fixed date or that provisions were made for renegotiation of the compensation at specified dates throughout its continuing term.
>
> While it is realized in this instance the Band Council and Calgary Power representatives may be of the opinion that they have concluded the transaction in good faith on the basis of the recommendations of the Band Council Resolutions, I should be pleased if you would advise whether, in your opinion there is any likelihood of re-opening the negotiations for the purpose of altering either the term of the agreement or the amount of the compensation, or both. If you are of the opinion that no further negotiation may be initiated, would you provide recommendation to the effect that the circumstances in this particular instance are sufficiently exceptional to warrant the alienation of rights to use 52.63 additional acres of the Reserve for a term which may be construed as "perpetuity" at compensation which equates with present land values?
>
> The grant of future similar rights in Reserves under your direction would be considerably expedited if you would ensure that negotiation of terms and

> compensation along the lines anticipated by the foregoing were commenced at the initial stages rather than near the end of the transaction.[132]

In the meantime, Weir had completed his survey and forwarded it to Thistlethwaite for review. On August 23, 1968, the Surveyor General circulated the plan to H.T. Vergette of the Lands Surveys and Titles Section, asking about the transaction for which the plan had been prepared and whether the plan was suited for that purpose.[133] MacAdam routed the plan through Ragan on September 9, 1968, asking him to determine its acceptability to local officials and the Band Council and to advise "if there are any locatees['] interests concerned and what the minimum agreed clearance over the Reserve roads will be."[134] Ragan in turn solicited the required information from Turner, who informed him that "[t]his plan was discussed with the Alexis Council on September 30th, and they have approved the plan as presented." Turner had also learned that the Band had no locatees on the reserve and that, although the height of the line would be "a basic distance of 22 feet ... due to the flat terrain of the Alexis Reserve, the line will have a minimum clearance of approximately 26 feet."[135] Ragan returned the plan and Turner's comments to Ottawa on October 30, 1968.[136]

By November 5, 1968, Vergette's office had already informed Thistlethwaite that the plan appeared suited to the purpose of a proposed long-term permit under section 28(2) of the *Indian Act* and sought a description of the right of way lands.[137] Two days later, MacAdam asked Ragan for his reply to Young's comments of September 5, 1968, "so that the terms of the permit can be clarified."[138] Ragan, relying on the work of his subordinate, E.C. Holmes, crafted his response of November 8, 1968, to address the right of way through the reserves of both of the Alexis and Paul Bands:

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[132] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, DIAND, to R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, June 24, 1968, Federal Records Centre, DIAND, file 774/31-3-7-133A-1, vol. 2 (ICC Exhibit 10, pp. 287–88).

[133] R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, to H.T. Vergette, Lands Surveys and Titles Section, Indian Affairs Branch, DIAND, August 23, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 289).

[134] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, September 9, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 295).

[135] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, October 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 296).

[136] R.D. Ragan, Regional Director – Alberta, DIAND, to Indian Affairs Branch, DIAND, October 30, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 297).

> Mr. Holmes agrees that easements for a fixed term with renegotiation of compensation at specific dates are desirable. Such agreements may be more easily negotiated with oil companies as these companies do not foresee a need for certain pipeline easements after oil fields have been depleted. Power transmission lines, on the other hand, are likely to be in place well into the indefinite future and the companies involved may be inclined to resist the concept of short term easements.
>
> When an easement is granted, only some of the rights of ownership are transferred. The value of an easement must, therefore, be something less than the market value of the fee simple. Having determined the value of the easement, injurious affection to the remainder of the property should be evaluated, and additional compensation should be paid accordingly. It is therefore not uncommon for the total compensation to exceed the value of the fee simple.
>
> Some years ago a dispute involving easement compensation was heard by Judge Blackstock in Southern Alberta. He directed that the company should pay compensation in the amount of 150% of the value of the land plus 10%. In his opinion this represented fair compensation for the easement itself and for injurious affection. This formula subsequently became known as the Blackstock formula, and although its existence is often denied, many settlements seem to be based upon it.[139]

After setting forth the particulars of five comparable transactions involving lands with both cultivated and undeveloped components, Ragan continued:

> These sales would indicate a value ranging from $70.00 to $100.00 per acre for cultivated land and $30.00 to $50.00 per acre for undeveloped land. It is

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[137] H.T. Vergette, Lands Surveys and Titles Section, DIAND, to R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, November 5, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 289).

[138] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, November 7, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 298).

[139] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to Indian Affairs Branch, November 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 299).

> interesting to note therefore that if the "Blackstock formula" was to be applied to the easement area of these reserves and having a market value of perhaps $40.00 per acre over most of its course, the compensation would be $66.00 per acre, or considerably less than the company has offered to pay.
>
> It should also be noted that the Right-Of-Way is to be cleared at company cost, and that this will result in increased value. There is nothing to prevent the Indian people from using this land for pasture or other agricultural production.
>
> The power line over most of its course will travel in a due north-south direction and as agricultural fields are usually laid out in this direction, severance and other injurious affection will be minimal.
>
> In Mr. Holmes' opinion the compensation is fully adequate and acceptable.
>
> Should the Indian people or the Branch insist upon a short term and renewable agreement for an easement the company might claim with some justification that
>
> (1) an annual rental based on value should not exceed $3.00 to $5.00 per acre and
>
> (2) at this point in time there is no injurious affection of undeveloped lands.
>
> For the reasons outlined above I am inclined to the opinion that a short term renewable agreement is not in the interest of the Indian people in this particular case. I do believe however, that the agreement should not confer upon the company the right to erect anything more than the one transmission line upon the easement area, and that the company should agree to surrender all rights to the area without charge in the event that the easement is not required for the purpose intended.[140]

The same day – November 8, 1968 – Thistlethwaite sent the plan to Vergette for signature under section 43 of the *Canada Land Surveys Act*. Once this was done, MacAdam returned the plan to Thistlethwaite on November 14, 1968, with a request that two prints be sent to each of himself, Ragan, and Turner. He also reminded Thistlethwaite of the need for a legal description "suitable for insertion in a long term permit under Section 28(2) of the Indian Act."[141]

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[140] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to Indian Affairs Branch, November 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 300).

[141] J.H. MacAdam, Administrator of Lands, DIAND, to R. Thistlethwaite, Surveyor General, Legal Surveys, Department of Energy, Mines and Resources, November 14, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 302).

At this point, Indian Affairs' attention turned to drafting the permit. To this end, Turner met with the Band Council and representatives of Calgary Power to discuss the terms of the proposed document. On December 16, 1968, he reported to Ragan that, in his view, "the agreement ... drawn up by Headquarters for the Paul Band, Wabamun Indian Reserve No. 133A[[142]] meets with the satisfaction of all concerned." With the exception of the name of the band, the description of the land, and the level of compensation, the Paul Band's agreement, based on section 28(2) of the *Indian Act*, was identical in all material respects to the Alexis 1959 distribution line and 1967 extension permits. Turner continued:

> We have however, been unable to get the Alexis Band Council to say definitely what they feel should be written into a contract such as this.
>
> Since the Municipal Government Act of the Province of Alberta has been amended, we will have to look at some type of tax structure, as these installations will no longer be assessed by the Department of Municipal Affairs, as they belong to an Indian Reserve.
>
> The Band Council had indicated that the agreement should be renewed from time to time, and if the annual rental is agreed upon, it can be adequate to cover the tax assessment and make a one "package deal."[143]

For Indian Affairs' assistance, Turner attached precedents used by other bands as well as a copy of an agreement used by Calgary Power in non-reserve situations. He suggested that headquarters draw up and forward a draft agreement "so that we can sit down with both Council and Calgary Power officials, and discuss it clause by clause."[144]

Ragan forwarded Turner's memorandum to MacAdam on January 2, 1969, with his own suggestions regarding periodic payments and tax levies:

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[142] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., November 18, 1968, Federal Records Centre, DIAND, file 774/31-3-7-133A-1, vol. 2 (ICC Exhibit 10, pp. 306–9).

[143] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

[144] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

> I recognize that this request may present you with a problem in view of the indecision on the part of Band Council who indicated their desire for a lump sum settlement by Band Council Resolution No. 1967-68/22774-25. You may, however, have record of agreements made in other regions which would fit the situation here.
>
> I think it only right that the Band Council should levy a tax on property owned by Calgary Power on the reserve, particularly as the Province has vacated the field. Whether or not it is practical to levy such a tax as a form of rental I am not too sure. It might be more equitable to assess the improvements and to establish a mill rate equal to that of the Municipal District or County. You may have some thoughts in this regard.[145]

On January 15, 1969, Thistlethwaite forwarded prints of the plan to MacAdam, Ragan, and Turner,[146] followed two days later by the legal description to be inserted in the permit.[147] The area of the right of way, previously estimated at 41 acres, had been more accurately defined as 42.96 acres, meaning that, at the rate of $100 per acre negotiated by the Band and Calgary Power, the compensation payable for the right of way would amount to $4,296. With this information in hand, MacAdam's office drafted the proposed permit for the Alexis transmission line, using the Paul Band's permit of November 18, 1968, under section 28(2) as a template. However, the initial handwritten draft of the permit incorporated additional provisions not found in the Paul Band's permit – namely, that the lump sum consideration to the Alexis Band of $4,296 would be limited to a period of 20 years, with the consideration for the next 20 years to be agreed upon by the parties or submitted to arbitration.[148]

An official in MacAdam's office, R.J. Pennefather, prepared a draft memorandum originally intended to be forwarded over MacAdam's signature to Ragan with the permit to discuss the reasons behind these revisions. Although it is not clear whether the draft memorandum or the proposed permit were ever delivered, Pennefather's comments are of interest:

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[145] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

[146] R. Thistlethwaite, Surveyor General, Legal Surveys, Department of Energy, Mines and Resources, to J.H. MacAdam, Administrator of Lands, DIAND, January 15, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 302).

[147] R. Thistlethwaite, Surveyor General, Legal Surveys, Department of Energy, Mines and Resources, to J.H. MacAdam, Administrator of Lands, DIAND, January 17, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 317–19).

[148] Draft Agreement between Her Majesty the Queen, Represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., ca. January 17, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 306–9).

> In view of the general desire for maximum revenue by the Band, and security of tenure on the part of the applicant, I have followed the standard practice now prevailing in relation to oil pipeline agreements in Alberta in preparing the suggested terms and tenure included in this draft agreement.
>
> While taxation is entirely out of my purview, it is my responsibility to assure that (a) maximum revenue to the Band in the short run together with, (b) provision for review at reasonable intervals of the compensation payable, are included in the Agreement. The revenue factor bears no relation to taxation by the Band Council in order to raise revenue for authorized municipal administration costs. This is the essential point in regards to the Agreement; that insofar as compensation for rental of the land is concerned, the entire agreed upon consideration shall form part of the agreement and be fully detailed within it. As regards the normal capital and operating costs for municipal services provided by the Band, I am sure that the Company would and should assume its fairly assessed and taxed share. In this respect you will note Point Two of the attached draft Agreement which makes the Permittee liable for payment of municipal taxes.
>
> If the Band Council wish to consider a change in the terms of the attached agreement they will be carefully considered in view of the lack of a more specific consensus in their comments to date. Should the Band Council require changes or modifications in the terms of the Agreement let me know at your earliest convenience, providing your comments.[149]

Neither the draft permit nor a further typewritten version[150] was executed. Instead, MacAdam penned a revised memo to Ragan on April 9, 1969:

> Further to your memo of January 2, 1969, and enclosures, I may inform that the legal description of the lands for the right-of-way has now been received. As you are aware, we now have to apply for an Order in Council authorizing the grant of the right-of-way. When obtained, a draft agreement will be prepared for execution by

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[149] Draft memorandum from J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, undated, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 472).

[150] Draft Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., ca. January 18, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 310-12).

> Calgary Power. The terms will be for as long as required for the lump sum of $4,296.00.
>
> It is my responsibility that maximum revenue be obtained for the Band. The lump sum consideration in this case is in line with your strong recommendation in the last paragraph of your letter of November 8, 1968 (your File 774/31-3).
>
> The aforesaid consideration bears no relation to taxation by the Band Council in order to raise revenue for authorized municipal administration costs. You must be aware that Clause No. 2 of Agreements issued in such a case provides as follows:
>
> > "That the Permittee should pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable in respect to the said lands or the Permittee's use thereof."
>
> I have reason to believe the Power Company, while having negotiated in good faith, is not expecting that at a later date, it should have to pay taxes levied by the Band Council in addition to the compensation moneys already agreed upon. It may well be that in this expectancy, the Company would have altered substantially its offer on a per acre basis.
>
> In any event, the matter of taxation in general surely deserves further serious consideration. I believe it could be part of the preliminary negotiations for a transaction of this nature.
>
> As to the type of agreement to be drafted in this case (Alexis I.R. No. 133) it should be similar mutatis mutandis to the one drawn up for Sturgeon Lake I.R. No. 154 (your file 77/31-3).[151]

As the PHI report notes, MacAdam appeared to take no notice of Turner's December 16, 1968, request for a draft agreement that he could discuss with the Band and representatives of Calgary Power, nor did he offer any explanation of "why an Order in Council was now required to effect the easement rather than a permit under Section 28(2) of the *Indian Act*."[152] His memorandum to Ragan also differed materially in several respects from the draft prepared by Pennefather, as the PHI report notes:

> In the first place, the letter, which was to have been signed by MacAdam in his capacity as Administrator of Lands, suggests that taxation was an issue about which

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[151] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs Alberta, DIAND, April 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 321–22).

[152] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 19 (ICC Exhibit 6, p. 19).

> IAB [Indian Affairs Branch] officials in the Lands office knew very little. Secondly, in the final version of the letter MacAdam stated that it was his "responsibility that maximum revenue be obtained for the Band," whereas in the draft the responsibilities are stated to be maximum revenue to the Band in the short run and a provision for periodic review of the compensation. Thirdly, in the final version of his letter MacAdam discouraged the suggestion that the Band could or might tax CPL [Calgary Power] whereas in the draft text the view expressed is that the Company "would and should assume its fairly assessed and taxed share."[153]

Indian Affairs Reconsiders Its Policy for Utility Rights of Way

During this time, some of the close scrutiny that had been given by officials in Indian Affairs to the long-term interests in the oil and gas industry was being directed to a greater degree at the easements granted to utility corporations. On May 9, 1969, C.T.W. Hyslop, Assistant Director of the Indian-Eskimo Economic Development Branch, provided his immediate superior, J.W. Churchman, with a draft letter for circulation to regional directors across Canada soliciting their comments to assist in formulating a policy. In his covering memorandum, Hyslop wrote:

> To the extent that lands affected by Easements granted for "as long as required" in consideration of compensation paid in a lump sum calculated on the basis of current land values are no longer available for use by the beneficial owners of such lands, the current Departmental practice to grant easements to public utility corporations, is inconsistent with the Departmental policy of no sale or alienation of Indian reserve lands.
>
> In this connection it is desirable to examine current practices concerning the grant of easements to use and occupy Indian reserve lands, with a view to achieving closer adherence to that policy.
>
> It seems likely that any provision for substantial change in the form of easements over Indian reserve lands from those pertaining to non-Reserve lands will meet with serious objection by such corporations, and possibly from the Indians.[154]

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[153] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 21 (ICC Exhibit 6, p. 21).

[154] C.T.W. Hyslop, Assistant Director, Indian-Eskimo Economic Development Branch, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, May 9, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 323).

Three days later, Churchman circulated to the regional directors a letter incorporating Hyslop's first paragraph and adding:

> The Department intends to examine its current practices concerning the granting of long term easements to public utility corporations to use and occupy parts of Indian reserves for major transmission facilities. Initially the examination will concern itself with transmission facilities which pass through Indian reserves incidental to the provision of services to some point outside the Reserve's boundaries. The examination will be directed toward formulation of a policy applicable to all Indian reservation lands, which adheres more closely to the present policy concerning no sale or alienation of Reserve lands, than present procedures do.
>
> ...
>
> An easement for a major transmission facility granted for a term "as long as required" but requiring renegotiation of the compensation at intervals not exceeding 20 years, would be more in keeping with the Departmental policy than those granted by the present practice.
>
> It is noted that one or two Band Councils within recent months have negotiated easements for Electrical power transmission lines on a rental review basis. The practice however, is not widespread, and available information is insufficient to determine what effect adoption of a general policy requirement along such lines, would have on Indian reserves in your Region, as well as public utility corporations in the area.
>
> Your comments and recommendations in this respect, concerning all public utilities, i.e. Gas, Oil and Water pipelines; Electrical Transmission Lines; Telephone Trunk Lines; and Radar and Radio Tower installations, are invited.
>
> I should be pleased if your comments could range over as many aspects of the problem as you consider are pertinent to the formulation of a viable policy.[155]

Over the next several months, various officials within Indian Affairs responded to Churchman's letter with comments on how utility rights of way had affected reserves and ideas on how agreements with utility companies might be improved:

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[155] J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, to Regional Directors, Indian Affairs Branch, DIAND, May 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 324–25).

- Compensation should be paid annually rather than in a single lump sum.[156] Alternatively, according to E.A. Moore, the Supervisor of Indian Minerals, "the initial lump sum should be high enough to reflect [a] reasonable return for the period in question in addition to damage, severence [sic], inconvenience, etc."[157]

- Utility companies had secured easements too easily without paying fairly for the inconvenience caused by their installations – including interference with buildings being constructed on some sites, property being "defaced," interference with cultivation, and wide clearings on woodland and forest areas – which had resulted in diminished values.[158]

- Rights of way could be issued for lengthy terms, and indeed in perpetuity if required, subject to provision being made for periodic reviews of compensation.[159]

- "[T]o accurately reflect the changes in land and money values," the recommended maximum length of a term without a review was 20 years,[160] with most suggesting reviews every 10 years[161] and some proposing reviews every five years.[162] Alternatively, the length of the term might be varied "depending on the purpose for which the easement or lease is granted."[163]

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[156] E.A. Moore, Supervisor of Indian Minerals, Indian Affairs Branch, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28); S.C. Knapp, Regional Superintendent of Development – Manitoba, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 333–34); F.R. Butchart, Superintendent, Parry Sound Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Superintendent, Economic Development, Ontario, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 344).

[157] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28).

[158] S.C. Knapp, Regional Superintendent of Development – Manitoba, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 333–34); F.B. McKinnon, Regional Director – Maritime Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 343); F.A. Clark, Regional Director – British Columbia-Yukon Region, Indian Affairs Branch, DIAND, to Acting Director, Indian-Eskimo Economic Development Branch, DIAND, September 9, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 357–58).

[159] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28); D.R. Cassie, Superintendent, Six Nations Indian Agency, DIAND, to V.M. Gran, [Acting] Regional Director, Economic Development, Ontario, Indian Affairs Branch, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42); L. Morisset, Acting Chief, Economic Development, Quebec Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 25, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 354–55); F.A. Clark, Regional Director – British Columbia-Yukon Region, DIAND, to Acting Director, Indian-Eskimo Economic Development Branch, DIAND, September 9, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 357–58).

[160] A.G. Moore, Superintendent, Peterborough Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Economic Development, Ontario, DIAND, July 14, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 349).

- "[T]o reduce the conflict of re-negotiation, ... the payments [should] be tied to some index such as the cost of living, land values, etc."[164]
- The agreements should provide for arbitration in the event that the parties were unable to agree on the rent for the ensuing term at the time of rent review.[165]
- Where the sole purpose of the utility company's installation on a reserve was to benefit the residents of that reserve, the required easement should be granted without charge to the

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[161] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28); J.G. McGilp, Regional Director – Ontario, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 337); F.R. Butchart, Superintendent, Parry Sound Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Economic Development, Ontario, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 344); R.W. Readman, Superintendent, Simcoe Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Economic Development, Ontario, DIAND, July 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 346); A.J. Soney, Superintendent, Christian Island Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 8, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 347); A.D. Cameron, Superintendent, Bruce Indian Agency, DIAND, to [V.M Gran, Acting] Regional Director, Economic Development, Ontario, DIAND, July 15, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 350); D. Greyeyes, Superintendent, Kenora Indian Agency, DIAND, to V.M. Gran, Acting Regional Superintendent, Economic Development, Ontario, DIAND, July 16, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 351).

[162] F.A. Clark, Regional Director – Saskatchewan, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 13, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 339–40); D.R. Cassie, Superintendent, Six Nations Indian Agency,DIAND, to V.M. Gran, [Acting] Regional Director, Economic Development, Ontario, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42); F.B. McKinnon, Regional Director – Maritime Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 343).

[163] L. Morisset, Acting Chief, Economic Development, Quebec Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 25, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 354–55).

[164] D.R. Cassie, Superintendent, Six Nations Indian Agency, DIAND, to V.M. Gran, [Acting] Regional Director, Economic Development, Ontario, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42).

[165] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28); F.R. Butchart, Superintendent, Parry Sound Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 344).

company because (a) the charge would simply be passed on to the consumers on the reserve in any event, and (b) "where the government is paying full costs of installation it would be unrealistic to ask the government to compensate the people for services they were receiving."[166] According to F.A. Clark, the Regional Director for Saskatchewan, "[t]his is particularly true in the case of reserves in remote areas."[167]

- The easement should be cancelled and the land within the right of way should be returned to the Band when the land ceases to be required for the purpose for which it was acquired.[168]

- Where a Band's use of reserve lands is effectively terminated by the installation of a utility company's works, those lands should be exchanged for other land or the utility company should place Indian Affairs in funds to purchase land, with the exchanged or purchased land subsequently constituted as new reserves.[169]

- The Band should be permitted to relocate the right of way and the works within it at the company's expense, or the lease should be subject to renegotiation, if it is later found that the existing location adversely affects development of the reserve.[170]

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[166] S.C. Knapp, Regional Superintendent of Development – Manitoba, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 333–34).

[167] F.A. Clark, Regional Director – Saskatchewan, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 13, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 339–40).

[168] J.G. McGilp, Regional Director – Ontario, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 337); R.W. Readman, Superintendent, Simcoe Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 346); A.J. Soney, Superintendent, Christian Island Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 8, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 347); D. Greyeyes, Superintendent, Kenora Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 16, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 351).

[169] D.R. Cassie, Superintendent, Six Nations Agency, DIAND, to V.M. Gran, Acting Regional Director, Economic Development, Ontario, Indian Affairs Branch, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42); F.B. McKinnon, Regional Director – Maritime Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 343).

[170] J.G. McGilp, Regional Director – Ontario, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 337); A.J. Soney, Superintendent, Christian Island Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 8, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 347); A.D. Cameron, Superintendent, Bruce Indian Agency, DIAND, to Acting Regional Superintendent, Economic Development, DIAND, July 15, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 350); L.

- Small reserves should be entirely avoided by utility companies unless the utility is intended to serve the reserve community in passing.[171]

- Bands in Ontario's Peterborough Indian Agency were of the view that they would permit no further easements on their reserves.[172]

In underscoring the need for periodic renegotiations of rent, S.C. Knapp, the Regional Superintendent of Development for Manitoba, added:

> The argument that you pay for the pole once and for all does not truly compensate the farmer for the inconvenience that pole will cause him for the next twenty years. ...
>
> These are long-term inconveniences which are certainly never fully compensated for by paying $10. to $15. per pole. With large transmission lines the problem becomes even more accentuated because of the erection of towers. It is my feeling that utility companies have misinterpreted their rights by assuming that everything they were doing was for the good of the public. They have often neglected to realize that what was good for the public was also good business for them and sometimes an inconvenience for the individual land holder.
>
> As the inconvenience continues as long as the transmission line is there, the cost of the inconvenience will escalate according to the cost of living and inflationary trends in the area. ...[173]

D.R. Cassie, the Superintendent of the Six Nations Indian Agency, advised his superiors that he eagerly anticipated the development of a general policy which he was sure "would be beneficial

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Morisset, Acting Chief, Economic Development, Quebec Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 25, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 354–55); F.A. Clark, Regional Director – British Columbia-Yukon Region, DIAND, to Acting Director, Indian-Eskimo Economic Development Branch, DIAND, September 9, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 357–58).

[171] V.M. Gran, Acting Regional Superintendent, Economic Development, Ontario, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, July 21, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 353).

[172] A.G. Moore, Superintendent, Peterborough Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 14, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 349).

[173] S.C. Knapp, Regional Superintendent of Development – Manitoba, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 333–34).

to Indian bands who are often in a weak position when it comes to negotiating with these large and well-established companies"; he highlighted the superior bargaining position of the utility companies when he noted that they would, "no doubt, ... bear in mind the possibility of going around reserve lands, rather than through them, if the terms are not agreeable."[174] Conversely, A.D. Cameron, Cassie's counterpart at the Bruce Indian Agency, believed that bands should be responsible for their own negotiations with the utility companies and that Indian Affairs "should only be called upon by the Band Council to give Legal Advice and to draw up the necessary documents."[175]

E.A. Moore, the Supervisor of Indian Minerals, provided specific comments regarding the impact of changes in the municipal taxation scheme in Alberta:

> Special consideration should be given in Alberta respecting the taxation status of the Bands now that it would appear that taxes derived from industrial development will go to Band funds rather than the municipality. This will make development on Reserves more desirable than in the past.[176]

As the PHI report suggests, the "weakest endorsement"[177] of Churchman's proposed policy change came from R.M. Sutherland, the Acting Regional Director for Alberta, who stated:

> I agree that it would be desirable to negotiate easements on a rental review basis, and this is apparently being accomplished insofar as oil and gas pipelines are concerned. I have no knowledge of any instances where negotiations on this basis have been carried out with power utility companies in Alberta. I suspect however that some of these companies such as Calgary Power Limited might object strongly to any clause providing for the periodic review of compensation. Should any difference in

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[174] D.R. Cassie, Superintendent, Six Nations Indian Agency, DIAND, to V.M. Gran, [Acting] Regional Director, Economic Development, Ontario, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42).

[175] A.D. Cameron, Superintendent, Bruce Indian Agency, DIAND, to Acting Regional Superintendent, Economic Development, DIAND, July 15, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 350).

[176] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28).

[177] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999 (ICC Exhibit 6, p. 29).

> attitude exist, it might be attributed to the probability that an electric transmission line will remain in place in perpetuity while the continued need for oil and gas pipelines is more easily predicted. Thus an oil company is less likely to object to a review of compensation at the end of a twenty year period if the company believes that it will have no use for the pipeline beyond the twenty year period. The typical power transmission company, not being dependant [sic] on a depleted resource, is more likely to be interested in the outright purchase of the rights conveyed in the easement.
>
> Compensations paid in recent years for easements to Public Utility Corporations have normally exceeded the market value of the lands affected, and it would be reasonable to assume that any excess paid over and above the value of the easement is designed to compensate for injurious affection to lands outside the area of the easement itself. Where little or no use is being made of the land adjacent to the easement area it is difficult if not impossible to establish that there is any injurious affection at the present time. For this reason the compensation offered in lump sum often seems generous even though changing land use might in the future render the settlement less attractive. The point is that band councils might still prefer to accept what appears to be a generous lump sum settlement in preference to an annual rental which in the early stages might be relatively low because of the present absence of injurious affection.
>
> I have noted with interest your statement that several band councils within recent months have negotiated easements for Electric Power Transmission Lines on a rental review basis. It would be of interest to know how that compensation compared with any lump sum compensation paid for easements on non-Indian lands adjacent to those same reserves. ...
>
> Finally I would draw your attention, as Mr. E.A. Moore has done, to the fact that municipalities in Alberta have discontinued the practise of taxing non-Indian interests on Indian reserves. Band Councils representing band populations are or could be the taxing authorities as well as the effective owners of the land. Public Utility Corporations therefore should clearly understand that any rentals payable with respect to easements should not in any way affect the power of the band councils to tax the interests of those companies on the reserves.[178]

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[178] R.M. Sutherland, Acting Regional Director – Alberta, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, May 28, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 330–31).

The Transition Period

As the responses to Churchman's policy initiative arrived in Ottawa and Indian Affairs considered its options, questions arose as to how negotiations that were already underway should be handled. On a June 6, 1969, inquiry from H.T. Vergette, at that time the Acting Chief of the Lands Division, Hyslop noted in the margin:

> In this case where the Region has already entered into negotiation with the Company with the consent of the Band Councils on a non-renegotiable basis I do not think that we should make any changes in agreements already approved or under negotiation at time of writing as per Mr. Boys letter.[179]

In August, Hyslop directed a more formal memorandum to Vergette:

> As you are aware there are strong arguments which can be put forward to support arrangements which give utility companies rights-of-way in perpetuity for a lump sum payment. On the other hand there are equally strong and valid arguments to support the land owners['] claim for re-negotiation of compensation at fixed intervals.
>
> It has been the Department's recent policy I understand not to alienate land for long periods of time either by lease, easement, permit, right-of-way or other occupation without opportunity for renegotiation of compensation. This I believe is viewed as part of the trust function where resistance is given for the most part to alienation by fee simple or otherwise unless the land use is clearly in the public interest as for instance in the case of public roads or highways where the Indian reserve lands benefit from such alienation.
>
> Until the proposed new land policy being prepared by Mr. Joubert is accepted I suggest that we continue to administer Indian lands in the same manner as we have in the recent past, i.e. getting the best possible terms for the Indians. I realize that this will not be popular with utility companies who are quite used to negotiating with non-Indians in quite a different way. However, when we have clarification of the proposed policy and new land act the whole matter of land alienation should be gone into thoroughly and the practice of granting of easements to public utility corporations should be thoroughly investigated in so far as provincial practice is

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[179] Handwritten marginal note from [C.T.W. Hyslop], Assistant Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, DIAND, on letter of June 6, 1969, from Vergette to [Hyslop], Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 336).

> concerned. We will at that time then be in a better position to recommend on future policy in so far as Indians are concerned.[180]

While the decision regarding government policy was pending in mid-1969, MacAdam wrote to Ragan to determine whether he still maintained that the transaction between the Alexis Band and Calgary Power should proceed on the basis of a single lump sum payment as outlined in the Band Council Resolution of March 4, 1968:

> You will recall that a few weeks ago, a memorandum was sent to all Regional Directors considering a change in the Departmental policy on the issuance of long-term permits for transmission line purposes. I understand you have already submitted your views and comments on this subject.
>
> However, in dealing with this particular case involving Alexis Indian Reserve No. 133, we would like to know if you still strongly recommend that the permit to issue in this case be for as long as required for the lump sum of $4,296.00....[181]

The Assistant Regional Director for Alberta, M.G. Jutras, responded on Ragan's behalf on July 9, 1969:

> In reply to your memorandum of June 23, 1969, concerning the above-named Right-of-Way Permit, this will confirm that we still recommend that this permit be issued for as long as required for the lump sum of $4,296.00. This is in accordance with the Band Council's wishes and further substantiated by our previous covering memo on the subject.[182]

On the basis of this recommendation, on September 23, 1969, Jean Chrétien, at that time the Minister of Indian Affairs and Northern Development, counselled the Governor General in Council to grant an easement to Calgary Power across IR 133 "for so long as such easement is required for electric power transmission line purposes."[183] Perhaps more interesting is the fact that the recommendation provided for the easement to be granted pursuant to section 35 of the *Indian Act*, with the consent of the Governor General in Council to Calgary Power's exercise of its statutory powers of expropriation, rather than under section 28(2) as had been the case with the 1959 distribution line and the 1967 extension. The Minister's recommendation was forwarded to the Privy Council on September 24, 1969.[184]

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[180] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, DIAND, August 11, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 356).

[181] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, June 23, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 345).

[182] M.G. Jutras, Assistant Regional Director – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, July 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 348).

The New Policy

That same day, Hyslop advised the regional directors of the department's new policy regarding the granting of rights of way for electrical transmission lines across Indian reserves:

> Basic to the policy to be followed in granting easements for electric power transmission lines, pipe lines, etc., for a term "as long as required" will be the provision for a review of compensation at least every twenty (20) years. This is the maximum time which may elapse between reviews and attempts should be made wherever possible to negotiate for shorter review periods.
>
> In negotiations with public utilities, pipeline companies, telephone companies, etc., the following points should be borne in mind:
>
> (a) ...
>
> (b) Adverse effects on future development of the Reserve. There are several examples of relatively small Reserves which have been rendered virtually useless by the multiplicity of easements and rights-of-way for various purposes. It is most important, therefore, that when major easements or rights-of-way are being negotiated that advice and comment be obtained from development and land use personnel and that this advice be made available to the Band Council involved.
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> (c) Attitude of Band Councils. In many cases the Band Council may view the situation simply as a matter of a large payment now as opposed to a smaller payment now with a possible further payment at some later date. It is the

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[183] Jean Chrétien, Minister of Indian Affairs and Northern Development, to Governor General in Council, September 23, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 359-60).

[184] Indian-Eskimo Economic Development Branch, "Précis for the Clerk of the Privy Council," September 15, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 361).

> responsibility of the staff to explain the long term advantages of being able to re-negotiate rentals.
>
> Where final agreement has been reached between Band Council and applicant companies or where negotiations are almost complete on the basis of a "one-and-for-all" payment, we will be unable to refuse these agreements entered into in good faith. It is important, however, to ensure that all of your staff, both in your office and in the District offices be made aware of the Department's attitude toward all new applications.[185]

Apparently considering itself governed in this case by the last paragraph of Hyslop's policy, the government granted approval of the right of way across IR 133 by Order in Council dated October 1, 1969.[186]

Eight days later, MacAdam forwarded four copies of a draft permit to Ragan for execution by Calgary Power. Noting that the department had no record of having received the payment of $4,296 at $100 per acre for the 42.96 acres in the right of way, MacAdam asked Ragan that, "when presenting this permit for execution, you request the permittee to remit the aforesaid sum with the executed copies."[187] Ragan directed the permits to Calgary Power through the Edmonton-Hobbema District office, and Calgary Power's Land Agent, S.C. Johnson, returned all four signed copies, together with the company's cheque for $4,296, on December 30, 1969.[188] Acting District Supervisor I.F. Kirkby arranged for the cheque's deposit with the Receiver General on January 5, 1970,[189] and forwarded the permits to MacAdam the following day.[190] Following their execution by the department, MacAdam returned two copies of the permit to Kirkby on January 14, 1970, for his file and distribution to Calgary Power.[191] The permit was registered in the Indian Land Registry on January 15, 1970, as instrument 16083.[192]

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[185] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to Regional Directors, DIAND, September 24, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 362–63).

[186] Order in Council PC 1969-1884, October 1, 1969, DIAND, Indian Land Registry, Registration No. 14169 (ICC Exhibit 10, pp. 365–68).

[187] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, October 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 373).

[188] S.C. Johnson, Land Agent, Calgary Power Ltd., to Edmonton-Hobbema District Office, DIAND, December 30, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 375).

[189] DIAND, Receipt Voucher, January 5, 1970, Federal Records Centre, DIAND, file 774/31-3-2-133, vol. 2 (ICC Exhibit 10, p. 383).

The permit provided that, in consideration of the sum of $4,296 paid by Calgary Power, the Minister granted the company, "for such period as the said lands are required for a right-of-way for power transmission line purposes," the right "to construct, erect, operate and maintain towers and poles with anchors, guy wires, brackets, crossarms, insulators, transformers, and their several attachments and to string one or more lines of wire for the transmission and distribution of electric energy and for communication purposes." In addition to being permitted to enter on the reserve from time to time as required to maintain its works, subject to the obligation to pay compensation for any loss or damage suffered by the Band or locatees by reason of its entry on and use of the reserve, Calgary Power acquired the right "to clear the right-of-way and keep it cleared of all or any part of any trees, growth, buildings or obstructions now or hereafter on the right-of-way which might, in the opinion of [Calgary Power], interfere with or endanger the construction, erection, operation, maintenance or stringing of the works or any part thereof." This right extended to trimming or cutting down trees on IR 133 outside the right of way which, in Calgary Power's opinion, "might in falling or otherwise endanger the works or any part thereof." The permit also included a term similar to the taxation provision in the 1959 and 1967 permits:

> 1. That the Grantee shall pay all charges, taxes, rates and assessments whatsoever payable by the Grantee or any occupant of the right-of-way which shall during the continuance of the rights hereby granted be due and payable

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[190] I.F. Kirkby, Acting District Supervisor, Edmonton-Hobbema District, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 6, 1970, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 384).

[191] J.H. MacAdam, Administrator of Lands, DIAND, to [I.F. Kirkby], Acting District Supervisor, Edmonton-Hobbema District, DIAND, January 14, 1970, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 385).

[192] Registrar, Indian Land Registry, DIAND, "Application to Register an Instrument," January 15, 1970, Federal Records Centre, DIAND, file 774/31-3-2-133, vol. 2 (ICC Exhibit 10, p. 386).

> or be expressed to be due and payable in respect of the works or the use by the Grantee of the right-of-way.[193]

The permit made no reference to clauses 3 and 6 of the March 4, 1968, Band Council Resolution under which band members were to be paid at the rate of $300 per acre to clear 61 acres of land and were to be permitted to use the right of way "for pasture or agriculture as long as it does not interfere with the lines." With regard to the clearing fee, the SCW report of April 29, 1996, notes that, "[a]s this fee would have been paid directly to Band members, no record of the financial benefit is found in the Departmental files."[194] However, at the community session on December 5, 2001, elder Howard Mustus stated:

> We want to clarify that there was no compensation. What our people did was work for that benefit [the clearing fee]. There was no compensation. Let's get that clear. The blocks as was dictated to by Indian Affairs, you drew a number and the blocks were numbered. That's what you got. So you worked and cleared that block, and it was worth $250 [sic], and that was the going rate for – based on acres that we cleared in the place. So as far as compensation is concerned, there is no compensation. The resources that our people obtained was for the work that they done clearing the right-of-way.[195]

In addressing the clearing fee payable in relation to the right of way for the 1969 transmission line, elder Phillip Cardinal also remarked:

> Again, according to my memory, I do remember that when those parcels of lands that we referred to this morning that were divvied out to the Band members, to each family, I believe it was half acre each or something like that, the payment was made in cash. I believe the cash was brought out – I don't know about the cash. The Chief at the time made the payments in cash, and that's all I remember. I don't

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[193] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., October 1, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 369–72).

[194] "Alexis Powerline Easement Claim," prepared at the request of Specific Claims West, April 29, 1996 (ICC Exhibit 4, p. 20).

[195] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 35, Howard Mustus).

> remember any other payments whether it [was] by cheque or any other way, money order or whatever, paid towards the Band's account anywhere. I can't recall that.[196]

From this testimony it seems evident that band members cleared the right of way and were paid for doing so. It is also evident, however, that band members were paid only for the initial clearing and were not hired to keep the right of way clear of new growth. Chief Francis Alexis remarked that, although underbrush grew quickly on the right of way and the Band would have welcomed the work, Calgary Power proceeded without consulting the Band to scrape and spray the right of way using machinery to get rid of the new growth. This, stated Chief Alexis, deprived band members of opportunities to earn income.[197]

Phillip Cardinal added that the spraying made them reluctant to use the right of way:

> And the other thing was that we couldn't even take advantage of cutting and gathering the regrowth and stuff like that because he came by, and without even asking our – without getting any consent from the leadership, they went ahead and sprayed it and we don't even know what they sprayed it with. It might have been, you know, the chemicals they use to spray the roads with. We don't know what they – you know, those might be cancer-causing agents they might have used, we don't know that. And nobody mentioned that to us like Indian Affairs, I mean, who are supposed to be responsible for what the (inaudible) certain obligations that are complied with, and I guess obviously not protecting the land that's supposed to have been set aside for our use, I guess. [198]

When asked whether any band members had attempted to carry on farming activities on the right of way after the transmission line was built, Chief Alexis added:

> Some people tried to use it but, like I said, were scared.... And they [Calgary Power] scraped the – right from one end of the Reserve to the other under the transmission line so it would kill the plants and then the trees and then everything. I don't know

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[196] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 58–59, Phillip Cardinal).

[197] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 67, Chief Francis Alexis).

[198] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 68–69, Phillip Cardinal).

> anybody who would want to plant a garden or something there after we don't know what was sprayed here because we'd need a report.[199]

Howard Mustus identified another reason why, despite Indian Affairs' assumption that the Band would benefit from being able to use newly cleared lands within the right of way for agricultural and other purposes, that benefit was not realized:

> Today the land underlying the high-voltage transmission line as we've referred to is (inaudible). There's no utilization, we can't use it for anything. People in the past attempted to try and build close to it, but they – there was always the interference, you know, in their electrical appliances and that type of thing. And it created a situation for us in the community and our planning. It's a restricted core area.[200]

Chief Alexis added:

> Our people have not utilized the land since that transmission line has been put there because a few years back I think there was big talk about the electromagnetic radiation from transmission lines, that it has some kind of impact on people's health and well-being, and a lot of people are scared to use that line for anything else.[201]

Nelson Alexis further elaborated on the practical difficulties that the transmission line had imposed on the reserve:

> You know, this land that we're talking about here, the narrow – we call it the narrow because it comes to a narrow part of the lake here.
>
> But this land that we're talking about is probably one of the, you know, the best lands in this whole – you know, this part of the country. We – all along this lake we have recreational, you know, summer recreational uses for this lake and we have prime lands here. And you know what? That power, this power line goes right through that. It splits that thing right in half.[202]

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[199] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 90, Chief Francis Alexis).

[200] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 40, Howard Mustus).

[201] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 89, Chief Francis Alexis).

[202] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 31, Nelson Alexis).

Chief Francis Alexis concurred:

> But today I think we can identify a whole bunch of uses, but because of transmission line being there, we can't. We have to compromise our infrastructure, our capital value here, our subdivisions, our core area, and sometimes even some of our plans have to be altered because of our transmission lines.[203]

INTRODUCTION OF PROPERTY ASSESSMENT AND TAXES ON IR 133

The permits relating to all three power lines on IR 133 provided that Calgary Power would "pay all charges, taxes, rates and assessments whatsoever ... which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable" with respect to the lines or the company's use of the right of way lands. Clearly, the permits contemplated property taxes, but when the transmission line was installed in 1969 the Alexis First Nation knew nothing about taxation or adopting a property tax bylaw. In the words of Chief Alexis:

> I don't remember anybody talking about taxation or taxation bylaw. Just recently, in the '80s I think, we come to understand taxes, and we've – in the '90s we're try [sic] to develop our own taxation bylaw and it took us about almost ten years to get it into place. It was done just recently, but it was started a long time ago.
>
> But at that time [in 1969] I don't think there was an understanding of taxes or anything because we were supposed to be tax exempt....
>
> [W]e didn't even have policies then let alone taxation bylaws. I mean, you know, we were just beginning to learn how to govern, you know, ourselves your way. And I say "your way" because we always governed ourselves our way before that.
>
> And we didn't have anything on paper at that time. And taxation, you talk about taxation, you know, in that time would be completely out of the question.[204]

As we have already seen, the First Nation approached TransAlta in 1995 with a view to levying retroactive annual charges on the company's use of the lands.[205] TransAlta rebuffed the First Nation's efforts to impose additional charges and, although the company was prepared to consider paying taxes or to make payments in lieu of taxes, it refused to do so on a retroactive basis.[206]

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[203] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 89–90, Chief Francis Alexis).

[204] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 54, Chief Francis Alexis).

[205] Alexis First Nation, Band Council Resolution 95-96/133-3-6-20, September 19, 1995 (ICC Exhibit 1, pp. 38–39).

Phillip Cardinal spoke of the Band being advised in the late 1970s and in the 1980s by officials of Indian Affairs "to get a bylaw in place" because, as long as it failed to do so, the municipality had the right to assess and tax property on the reserve. He also recalled TransAlta's representatives stating that they had been paying property taxes to the municipality, although they did not indicate the quantum of taxes paid.[207] However, Chief Alexis testified that the First Nation did not learn of its taxation authority until more recently through its legal counsel,[208] and finally implemented a bylaw in 1997, which was submitted to Ottawa and given ministerial approval in 1998 or 1999.[209] According to Howard Mustus, it is the First Nation's understanding that each of the three power line rights of way is subject to the bylaw but the taxation power "is not retroactively enforceable."[210]

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[206] Wolfgang Janke, Vice President, Customer Services, TransAlta Utilities Corporation, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, October 23, 1995 (ICC Exhibit 2, pp. 3-4).

[207] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 69, Phillip Cardinal).

[208] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 56, Chief Francis Alexis).

[209] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 77, Chief Francis Alexis). The Alexis First Nation Property Tax By-Law, dated July 27, 1999, is on the record in this inquiry as Exhibit 13 but, based on Chief Alexis's evidence, it is not clear whether this is the original bylaw enacted by the First Nation.

[210] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 79, Howard Mustus).

PART III

ISSUES

The parties proceeded on the basis of two main issues drafted by Commission counsel following a planning conference on July 28, 2000. In order to analyze these issues, we shall address a number of questions about statutory and/or fiduciary duties that may have been owed to the Alexis Band, as they have been identified by the First Nation or Canada in their submissions.

The issues to be addressed in this report, therefore, are as follows:

1 Did the Department of Indian Affairs breach its statutory and/or fiduciary obligations, if any, to the Alexis Band in the manner in which the Department granted a section 28(2) permit and a section 35 right of way to Calgary Power to construct power utility lines in 1959, 1967, and 1969?

In order to answer the above question, it is necessary to ask whether the Crown owed the following duties to the Alexis Band and if so, if it breached its duty.

(a) Was there a duty to obtain fair and reasonable compensation for the 1959 and 1967 distribution lines? If so, was that duty breached?

(b) Was there a duty to advise the Band of the relative strength of its bargaining position with Calgary Power in the negotiations for the 1969 transmission line and to keep the Band informed? If so, was that duty breached?

(c) Was there a duty to obtain an independent appraisal of the fair market value of the land to be expropriated for the 1969 line and advise the Band accordingly? If so, was that duty breached?

2 Did the Department of Indian Affairs breach its statutory and/or fiduciary obligation to the Band by failing to obtain a reasonable annual fee, rental, or charge as permitted in agreements between DIAND and Calgary Power?

In order to answer the above question, it is necessary to ask whether the Crown owed the following duties to the Alexis Band and, if so, if it breached its duty.

(a) Did the Crown have a duty to prevent an exploitative agreement in 1969? If so, was the 1969 transaction exploitative by providing for a lump sum payment rather than annual compensation to be renegotiated at periodic intervals, or a combination of both?

(b) Was there a duty to obtain an independent assessment of the taxes, rates, charges, or fees being paid by Calgary Power to adjacent jurisdictions for the right of way for the same 1969 transmission line? If so, was that duty breached?

(c) Was there a duty to obtain annual revenues by means of taxes on Calgary Power? If so, was that duty breached?

(d) Was there a duty to minimally impair the Band's interest in the reserve lands granted to Calgary Power for the 1969 right of way? If so, was there a breach of that duty?

(e) Was there a duty to assist the Band to draft and implement appropriate taxation bylaws in the years following approval of the permit for the 1969 line? If so, was there a breach of that duty?

(f) Was there a fiduciary duty to obtain the Band's informed consent to the 1969 transaction? If so, was that duty breached?

Prior to framing the issues, the First Nation did not question the validity of the section 28(2) and section 35 permits under the terms of the *Indian Act*. The written and oral submissions of the First Nation likewise did not question the validity of the section 28(2) permits used to authorize the 1959 and 1967 distribution lines. The statutory validity of these two permits is therefore not in issue. The First Nation, however, questioned for the first time in its written submissions the validity of the permit for the 1969 transmission line on the basis that there was a lack of evidence of a valid public purpose justifying an expropriation of reserve lands under section 35(3) of the *Indian Act*. Since this issue was not canvassed previously by the parties, and since Canada has had no opportunity to bring forward evidence to rebut this allegation, the Commission will not consider this question. The analysis will proceed on the premise that the 1959, 1967, and 1969 permits were valid, having met the technical requirements of the *Indian Act*.

PART IV

ANALYSIS

Before beginning to analyze the issues, we shall set out our understanding of the social, economic, and political condition of the Alexis Band in the 1950s and 1960s. It was the capacity or lack of capacity of the Alexis leadership at the time to understand the nature of these rights of way that informs their actions and determines the degree of oversight required by the Crown to ensure that these transactions, in particular the 1969 line, were in the best interests of the Band.

VULNERABILITY OF THE ALEXIS BAND

The First Nation asks us to find that the Alexis Band was vulnerable and dependent on the Department of Indian Affairs in the Band's negotiations with Calgary Power. Most of the evidence before us regarding the conditions on the reserve and the ability of the leadership to negotiate with the power company comes from the witnesses at the community session. Band Councillor Nelson Alexis remembered

> those years as being really hard years. You know, we hardly had any roads here. I was just looking at my gloves. You know, my mom would make mittens out of our socks. You know, she put a little thumb on it and that was our mitts. And, you know, we had to come to school, you know, over – up on the west end of the Reserve through the lake we used to come. And these were really hard times. And you talk about the economic development. There was nothing here.[211]

Phillip Cardinal, whose father was on the Band Council in 1967, also spoke of the general conditions on the reserve in the 1950s:

> Most of our people lived in log cabins. There was no Band office or nothing on the Reserve, nothing. No power, no roads even. So there was no kind of economic development opportunity ... those were real hard times and there was nothing – no kind of support like finance-wise or resource.[212]

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[211] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 28, Nelson Alexis).

[212] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 34, Phillip Cardinal).

Employment prospects on the reserve were also grim, according to witnesses. Since most of the jobs were off the reserve, the opportunity to make some money on reserve by clearing brush for a right of way was, in the words of Nelson Alexis, "heaven-sent because we didn't have anything here."[213] The only benefit to the community from the proposal to build the 1969 transmission line was summed up by Mr Cardinal:

> The only benefit is he [sic] at the time was – that time they had their – they would rely on what one of the previous speakers here said was hunting, fishing, and trapping, and I guess a lot of them worked in the lumber camps and that. It was whatever chance they got to make a dollar, I guess they went for it because it was – well, survival, I guess. There's no – there was no other means of survival besides that, besides the hunting and fishing and trapping and the lumber.[214]

Not only were economic times tough, according to witnesses, but band members, including the leadership, had very few skills in the English language. Chief Francis Alexis told us that his father, who was Chief in 1959, did not know how to read and write English, the language used in the Band Council Resolutions that provided the Band's consent to the three power lines: "my dad would read and write in the Cree syllabics. They used that to write Stony, and I remember (inaudible) used to do the writing for them."[215] Mr Cardinal confirmed that most members of Council in 1967 "probably didn't understand English very well and didn't write the English very well, either. And if they did, then maybe they could sign their name and stuff like that, but that's probably it."[216]

On the question of the Alexis Band's relationship with DIAND officials, several witnesses testified that the relationship was not good. Harold Mustus spoke of DIAND officials as having an attitude of "having to do business their way, not our way."[217] Phillip Cardinal reported that most of the administrative work, including the preparation of BCRs, was done by the Indian Affairs office in Edmonton, which would send the Indian Agent to the reserve once a month.[218] When asked by Commission counsel how the Band would have been in a position to assess whether or not compensation proposed by Calgary Power for a right of way was sufficient, Phillip Cardinal replied:

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[213] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 28–29, Nelson Alexis).

[214] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 24, Phillip Cardinal).

[215] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 20, Chief Francis Alexis).

[216] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 22–23, Phillip Cardinal).

[217] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 51, Harold Mustus).

> [w]e didn't have that kind of expertise to tell us, you know, it's worth this much or anything like that. There was no lawyers or no kind of consultants around to really advise us on that or advise on leadership or anything like that. Like some of the previous speakers said, when Indian Affairs wanted something done, well, they just brought the BCR out and the leadership were told to sign here and they signed there and there was never any questions asked and they were never told.[219]

Finally, the 1966 report of the Superintendent of the Edmonton Agency, Indian Affairs Branch of the Department of Citizenship and Immigration, cited earlier, supports the testimony of the First Nation's witnesses:

> [i]t is evident that the Enoch Band Council is fairly capable of operating more independently, whereas, Alexis, Alexander, Paul and Beaver Lake Councils still require *considerable guidance* and will do so for some time.[220]

Against this backdrop of limited literacy, education, and employment prospects, argues Alexis First Nation, the Band was vulnerable and dependent on DIAND's officials for counsel and ongoing guidance.[221] This dependency would have been a stark reality in the context of meetings with Calgary Power to discuss the possibility of rights of way over the reserve. The First Nation points to a 1967 *Financial Post* article and the company's 1969 annual report as evidence that Calgary Power, and its successor TransAlta Utilities, has been one of Alberta's largest utility corporations for decades and is the principal distributor of electrical energy in the province. As such, argues the First Nation,

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[218] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 26–27, Phillip Cardinal).

[219] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 35, Phillip Cardinal).

[220] Superintendent's Report, Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, March 31, 1966, to September 30, 1966, NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797, p. 3 (ICC Exhibit 10, p. 172). Emphasis added.

[221] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 11.

> [t]here was an obvious discrepancy between the bargaining power of one of the Province's largest business corporations and a Band struggling with literacy, a lack of infrastructure and a dependency on government bureaucracy to provide guidance and assistance.[222]

Canada, in contrast, maintains that the First Nation has not provided any evidence that would demonstrate the vulnerability of the Band.[223] With respect to the 1959 and 1967 distribution lines, Canada argues that "the evidence presented supports the opposite conclusion, that the Band council made a good and wise choice by agreeing to bring electricity to the reserve for the benefit of all members."[224] Regarding the 1969 transmission line, counsel for Canada in his oral submission points to the Edmonton *Journal* article written on March 5, 1968, just one day after the Band Council meeting that consented to the 1969 line, as impartial and compelling evidence that the Band Council knew what it was doing. He quotes from the article:

> And if the let's-get-down-to-business attitude of Chief Kootenay motivates his people the way it did his first council meeting, conditions cannot but improve still further ... The council got right down to the matters at hand. Calgary Power wants permission to put powerlines through part of the Reserve. Granted.[225]

Counsel for Canada argues that this article "dispels the notion a little bit of the vulnerability of the Band. The Band seemed to have a no non-sense [sic] approach, knew what it wanted to do and did it and started the process...."[226]

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[222] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 12.

[223] Submission on Behalf of the Government of Canada, July 16, 2002, p. 7.

[224] Submission on Behalf of the Government of Canada, July 16, 2002, p. 7.

[225] Alma Keroack,"Conditions Improve for Indian Reserve — Democratic System Pays off at Alexis," Edmonton *Journal*, March 5, 1968, p. 9 (ICC Exhibit 10, p. 268), quoted in Oral Submission on Behalf of the Government of Canada, August 20, 2002, p. 77 (Kevin McNeil).

[226] ICC Transcript, August 20, 2002, p. 77 (Kevin McNeil).

We cannot accept Canada's argument that no evidence of vulnerability has been put forward by the First Nation; the First Nation's witnesses and the Crown's own records collectively point to a condition of vulnerability and dependency in the community. Furthermore, we do not give the Edmonton *Journal* article the weight that Canada does, given the absence of any information about the journalist, in particular her professional qualifications and knowledge of this First Nation. Canada also appears to support a contrary position when it relies on a provision in the *Indian Act* prior to 1988 that prohibited a band from levying taxes on third parties unless the Governor in Council declared that the band had reached an advanced state of development.[227] Canada confirmed not only that an Order in Council containing this declaration with respect to the Alexis Band has not been located, but also that the evidence points to the contrary – "namely, that the counsellors of the day (1969) were illiterate and totally relied upon the Crown for advice and direction."[228]

We shall return later to the question of dependency as it affected the Alexis Band's decision-making capacity; however, we regard Canada's position on the question of vulnerability to be contradictory. On the one hand, it argued that the *Journal* article provides evidence of the Band's business know-how and lack of vulnerability, and on the other hand, it relied on the evidence put forward by the First Nation to argue that the Band was not sufficiently advanced to qualify for a taxing bylaw.

We are satisfied that the sum of the statements of the elders and other community members, together with the corroborating evidence of a government official familiar with the Alexis Band, support a finding that the Alexis Band was vulnerable in its negotiations with Calgary Power. Whether this vulnerability led to circumstances in which Canada should have exercised greater oversight and responsibility to question the Band's consent to the construction of the three power lines in 1959, 1967, and 1969 is a question to be determined in the following sections.

The First Nation argues[229] that if, as we have found, the Alexis Band was vulnerable in its dealings with Calgary Power, the legal burden of proof shifts to the more powerful party to establish the providence of the transaction, citing as authority the Supreme Court of Canada's case of *Norberg v. Wynrib*. This case concerned a breach of professional duty in which the court found that a physician had taken advantage of a female patient's vulnerability for his own personal gain. The First Nation relies on La Forest J's reference in this case to *Morrison v. Coast Finance Ltd.* (1965), 55 DLR (2d) 710 at 713, in which the factors of an unconscionable transaction are described as

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[227] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.

[228] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.

[229] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 34.

> proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left [the plaintiff] in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.

We agree, however, with Canada's submission[230] that the case of *Norberg v. Wynrib* is inapplicable to the facts of this claim. The other, "stronger" party with whom the Band negotiated was Calgary Power, not the Crown. There is no suggestion that the Crown was the beneficiary of an arrangement struck between the Alexis Band and Calgary Power. Moreover, the above reference in the *Morrison* case makes it clear that, before the onus of proof shifts to the defendant, the plaintiff must prove not only inequality of bargaining power but also that the resulting bargain was substantially unfair. Thus, we find that the burden of proving that the Band's transactions with Calgary Power were substantially unfair, and that the responsibility for those results lies with the Crown, continues to rest with the First Nation.

ISSUE 1 DUTY OF THE CROWN IN GRANTING RIGHTS OF WAY

Did the Department of Indian Affairs breach its statutory and/or fiduciary obligations, if any, to the Alexis Band in the manner in which the Department granted a section 28(2) permit and a section 35 right of way to Calgary Power to construct power utility lines in 1959, 1967, and 1969?

We shall examine this issue through three sub-issues.

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[230] Submission on Behalf of the Government of Canada, July 16, 2002, pp. 20–21.

Issue 1 (a) Duty to Obtain Compensation

Was there a duty to obtain fair and reasonable compensation for the 1959 and 1967 distribution lines? If so, was that duty breached?

The 1959 Distribution Line

The facts surrounding the 1959 permit to construct a power line on the Alexis reserve are not in dispute. Electrification of the Day School on the reserve was part of Indian Affairs' plan to upgrade the facility. Officials determined that the most cost-effective route would be to bring an extension line from the community of Gunn east of the reserve. The cost of constructing the line, including a transformer, was shared between Indian Affairs and consumers living east of the reserve. Indian Affairs' share of the total cost of $6,191 was projected by Calgary Power to be $2,500. The Day School was situated on the reserve and served children living on the reserve. The Band did not pay any of the cost of constructing the distribution line to the school.[231]

Indian Affairs obtained authority from the Band for Calgary Power to erect the line and poles across the reserve using a section 28(2) permit under the *Indian Act*. This was a common method of obtaining a right of way for utility power lines serving a reserve. Under section 28(2), however, any interest granted to the permittee, here Calgary Power, for a period longer than one year required the Band Council's consent in addition to the authorization of the Minister responsible for Indian Affairs.[232] On October 21, 1959, the Alexis Band Council met and passed a BCR authorizing an easement to Calgary Power to build a power line from the east boundary of the reserve to the school, the easement being 30 feet wide and 1 7/8 miles long. The only conditions recited in the resolution were that the Band would not receive any payment for the easement and band members would be employed to brush the right of way.[233] There is no record of the discussion at the Band Council meeting or the identity of those in attendance apart from the names of the three councillors who executed the BCR.

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[231] Will Smith, Commercial Supervisor, Edmonton Division, Calgary Power, to G.S. Lapp, Superintendent, Indian Affairs Branch, [Department of Citizenship and Immigration], June 15, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2 (ICC Exhibit 10, pp. 115–16).

[232] *Indian Act*, RSC 1952, c. 149, s. 28(2), as amended by SC 1956, c. 40, s. 10.

[233] Alexis Band, Band Council Resolution, October 21, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 124–25).

The permit itself, dated November 9, 1959, granted Calgary Power a right of way for as long as required for the purpose of an electric power line. It was silent on the condition that band members would be employed to clear the right of way, and no evidence exists to confirm whether Alexis members were given these jobs. In accordance with the BCR, however, no compensation was paid to the Band.

The First Nation does not argue that the Crown failed to comply with the statutory requirements of section 28(2) in granting a permit for the 1959 distribution line.[234] Rather, the essence of the First Nation's argument concerning the 1959 line is that the failure to obtain any compensation for the Band was a breach of treaty rights and a breach of the Crown's fiduciary duty to the Band arising from those rights.

Turning first to the alleged breach of the treaty, the First Nation argues that the promise of land under Treaty 6 included a "fundamental Treaty promise, which was assurance of a homeland for future generations. That is a historic underpinning to the entire fiduciary relationship."[235] The promise of land, argues counsel, also included a promise, flowing from the *Royal Proclamation of 1763*, to ensure the integrity of the land for future generations and the preservation of that land from exploitation or interference by third parties.[236] In addition, the provision of electricity to the school was a right, argues counsel, subsumed within the right to education in Treaty 6. The First Nation points to the case of *Mitchell v. Peguis Indian Band* as authority for the general proposition that treaty benefits are in the nature of a plenary entitlement.[237] The conclusion that the First Nation comes to is that the Band cannot be expected to trade off one right for another without fair and reasonable compensation. The First Nation, however, did not provide an analysis to show how it arrived at its conclusions regarding rights that are incidental to the treaty right to reserve land and the treaty right to education.

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[234] Reply Submission on Behalf of Alexis First Nation, July 31, 2002, p. 6.

[235] ICC Transcript, August 20, 2002, p. 14 (Trina Kondro).

[236] ICC Transcript, August 20, 2002, p. 14 (Trina Kondro). See also Submission on Behalf of Alexis First Nation, May 24, 2002, pp. 30–31.

[237] *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193, [1990] 2 SCR 85 at 130.

Canada did not address the treaty rights' argument and instead maintained that it would be unconscionable for the Crown to deny a First Nation electricity to its school if that would necessarily abrogate another treaty right. Further, says Canada's counsel, the First Nation is free to use its reserve land for many purposes, including schools and houses for its members, and it can also use its lands to bring electricity to those structures. "The fact of the matter is that electricity cannot be beamed in. Electricity has to pass over the land in some way or fashion."[238]

In the circumstances, the Commission is simply not in a position to agree or disagree with the First Nation's description of the content of its treaty rights without the benefit of a full analysis of the law on treaty interpretation by both parties. Further, even if the First Nation is correct in its characterization of these rights, counsel for the First Nation was unable to point to any authority to support the conclusion that a treaty benefit provided at the expense of the Crown solely for the residents on reserve, namely electricity to the school, should require, in addition, compensation to the First Nation if that benefit necessarily encroaches on reserve land.[239] We are, therefore, not able to accept the First Nation's proposition that, as a matter of treaty rights, Alexis was entitled to compensation for the 1959 right of way.

Was there a fiduciary obligation to obtain compensation for the Band in such a case? We think not. The leadership knew that the recipient of electricity would be a school on the reserve, which was in the process of being upgraded by Indian Affairs; they executed a formal BCR agreeing to the right of way for the purpose of electrifying the school; and they must have known that the Band would not be liable for the costs of construction. They also clearly envisaged that some band members would receive brushing contracts, although it is not known how much work, if any, was provided. Chief Alexis remarked that, because nobody had electricity on the reserve in 1959, the line to the school represented a benefit to the community and, recalls Chief Alexis, it also meant that people could watch television at the school.[240]

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[238] ICC Transcript, August 20, 2002, pp. 59–60 (Kevin McNeil).

[239] ICC Transcript, August 20, 2002, p. 25 (Trina Kondro).

Although we shall discuss the nature and extent of the Crown's fiduciary obligation more fully later in the report, we are satisfied on the facts that this was not a situation in which the Band made a bad decision as the result of the vulnerability of its leadership in negotiations with Calgary Power. Even though the Crown may have initiated the discussions between the Band and the company, the Band's decision was made with the necessary information, the decision was in the Band's best interest, and the Band freely gave its consent.

We also note in passing that a section 28(2) permit under the *Indian Act* is silent on the question of compensation, unlike the expropriation provisions in section 35 of the *Act*. There is, therefore, no statutory requirement to compensate a First Nation in return for its consent to a section 28(2) permit under the *Indian Act*.

The 1967 Distribution Line Extension

The extension of the distribution line in 1967 from the Day School power line to the south boundary of the reserve was, like the original 1959 line, authorized by a section 28(2) permit, and consented to by the Band Council as required for a permit in excess of one year. The primary difference between the 1959 line and the 1967 line is that, according to a preponderance of the evidence presented at the inquiry, the main purpose of the 1967 line was to bring electricity to cottages at an off-reserve community called West Cove on the south shore of Lac Ste Anne.

At the same time, we are satisfied from the community evidence that this line was also used to provide electricity to a number of houses on the reserve in 1967: "Most of the houses on the Reserve," said Chief Alexis, "they had no power until 1967 or '68, around centennial year."[241] Regardless of the primary objective of the 1967 line, its construction brought electricity to reserve houses for the first time as well as to an off-reserve location south of The Narrow, although it seems likely that construction of the line was halted before it reached West Cove.

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[240] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 70, Chief Alexis).

[241] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 71, Chief Alexis).

We note that Calgary Power's plan to supply electricity to houses on the reserve from the 1967 line would have been consistent with its statutory obligation to supply, if requested, electrical wiring to buildings along the path of a power line. *The Water, Gas, Electric and Telephone Companies Act* of Alberta provided that

> [w]here a company has constructed works for supplying any municipality or municipalities with gas, water, electricity or telephones and the company is able to do so, the company shall supply all buildings situate upon land lying along the line of any supply pipe or wire upon the request of the owner, occupant or other person in charge of any such building.[242]

Thus, it is reasonable to infer that the collateral purpose of the 1967 line, if not its original intent, was to provide electrical service to reserve houses. Howard Mustus's testimony corroborates that of Chief Alexis that electrification of houses took place starting in 1967.[243] A DIAND report in late 1967 further confirms that contracts had been let for electrification of 55 homes on the Alexis reserve .[244]

The only issue raised by the First Nation with respect to the 1967 distribution line extension is the adequacy of compensation. Again, we do not know the circumstances surrounding the 1966 BCR agreeing to the grant of a right of way for the 1967 line, the role of the Calgary Power representative at the meeting at which the resolution was passed, or the involvement, if any, of Indian Affairs. But, unlike the 1959 permit, this time there was an agreement between Calgary Power and the Alexis Band Council to pay the Band compensation in the amount of $15 per pole. The total compensation amounted to $195 for 13 poles and guy wires. Curiously, the 1966 BCR did not provide for band members to earn money by clearing the proposed right of way, and there is no evidence before us to indicate whether or not band members received any work.

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[242] *The Water, Gas, Electric and Telephone Companies Act*, RSA 1955, c. 361, s. 22, as amended by SA 1956, c. 60.

[243] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p 17, Howard Mustus).

[244] Edmonton-Hobbema District, Indian Affairs Branch, DIAND, "Semi-Annual Report – April 1/67-September 30/67," NA, RG 10, vol. 8444, file 774/23-4, part 2, p. 5 (ICC Exhibit 10, pp. 227–35).

The elders who commented on the benefits of electricity to the reserve in 1967 spoke generally of the convenience of having electricity to warm up a car engine in winter, to run modern appliances, or to watch television; however, Chief Alexis pointed out that the community pays for the electricity and that these so-called benefits do not help the children in terms of their culture and recreation, nor do they provide an economic benefit to the community.[245]

Notwithstanding some mixed views within the community on the benefits of electricity to the homes on the reserve, the First Nation is not arguing that the Band Council's decision to permit the right of way should have been prevented by DIAND. Canada argues that the BCRs consenting to the 1959 and 1967 rights of way "provide direct evidence of the Band's intention and desire to grant the permits of occupation for the purpose of bringing power to the reserve."[246] We agree with Canada's argument. Without evidence to suggest a subsequent change of mind, indecision, or misunderstanding of the arrangement with Calgary Power, we find the BCRs persuasive. The question is, was the $195 adequate compensation? If not, should DIAND have interceded to ensure that the amount of compensation reflected the best possible arrangement for the Band?

One method of assessing the adequacy of the compensation would be to ask what Calgary Power was paying non-reserve landowners and other bands for the construction of power line poles in similar situations. The First Nation, however, was unable to provide any evidence to suggest that $15 per pole was an unreasonable payment in circumstances where electrical services would be provided to both a reserve and a non-reserve community.

Canada points out that the departmental practice in addressing compensation for the granting of easements differed depending on the type of easement. The history of easements on the Alexis reserve in the 1950s and 1960s, in fact, illustrates that practice. In a case where the band was to be the sole recipient of the electricity, as in 1959, no compensation was payable. Where, however, the band agreed to a right of way for a distribution line initially intended for an off-reserve community but also servicing the reserve, as was the case in 1967, the band received some compensation. By contrast, in a case in which the band received no benefit of electricity from a power line crossing its reserve but serving only the interests of off-reserve communities and the power company, as with the 1969 line, DIAND recognized the need to ensure a different level of compensation.[247]

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[245] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 82–83, Chief Francis Alexis).

[246] Submission on Behalf of the Government of Canada, July 16, 2002, p. 9.

As was pointed out earlier, section 28(2) is silent on the question of compensation to a First Nation where a section 28(2) permit is granted. Nevertheless, the 1967 line did demand some compensation to the First Nation because others were intended to benefit from its construction over reserve land. The First Nation received compensation in the amount of $195. It also received the benefit of access to electricity from the line. Without any evidence to suggest that the amount of $195 was patently unreasonable in the circumstances, we are unable to agree with the First Nation that Canada owed a duty, fiduciary or otherwise, to attempt to obtain better terms for the Band. Although the First Nation was vulnerable in its ability to negotiate with Calgary Power, there is no evidence to suggest that the company took advantage of this vulnerability in its plans to build a distribution line to service the West Cove cottages.

There are two remaining questions related to adequacy of compensation that the First Nation raises in connection with the 1959 and 1967 lines. The first question relates to whether band members received work clearing the 1959 right of way, one of the terms of the BCR, but one which was not inserted in the subsequent permit. Further, the absence of any reference to band employment in the BCR consenting to the 1967 right of way is also questioned by the First Nation. The only evidence before us of band members clearing brush from a right of way, however, relates to the 1969 transmission line.[248] Without any evidence indicating that band members were not employed clearing brush on the 1959 line, we are unable to determine whether the Band was treated unfairly by Calgary Power and, if so, whether DIAND bore any responsibility for the consequences.

The second question relates to the insertion of a taxation provision in each of the permits granted to the permittee, Calgary Power, in 1959 and 1967. The legal implications of this clause in all three right of way permits affecting the Alexis reserve will be discussed in the context of the 1969 transmission line.

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[247] Submission on Behalf of the Government of Canada, July 16, 2002, p. 9.

[248] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 25, Phillip Cardinal; p. 28, Nelson Alexis; p. 35, Howard Mustus).

The Fiduciary Relationship and the 1969 Transmission Line

The remainder of the issues in this claim relate to the transmission line right of way constructed across the Alexis reserve from the southeast to the northeast boundary to service non-reserve communities. The issues deal primarily with the extent of the Crown's fiduciary relationship with the Alexis First Nation and the nature of the fiduciary duties that arose in the circumstances surrounding the negotiation and implementation of the agreement to grant the transmission line right of way to Calgary Power.

We have already found that the Alexis First Nation was in a vulnerable state owing to the relatively low levels of literacy and education and the high levels of poverty and unemployment experienced by the Band in the 1950s and 1960s. It was clearly not on a level playing field with Calgary Power when it came to face-to-face negotiations. Nor would the leadership have understood the statutory requirements in section 28(2) of the *Indian Act*. Nevertheless, the circumstances surrounding the 1959 and 1967 lines were straightforward in that the Band understood that, in return for its consent, the distribution lines would bring direct benefits to the community in the form of electrification. As we have found, no fiduciary duty arose on the part of the Crown to assist the Band to negotiate a better deal because, as we have found, the agreements on compensation were adequate. The fiduciary relationship is, however, critical to the circumstances surrounding the grant of a right of way to Calgary Power in 1969.

The source of the fiduciary relationship between the Alexis First Nation and the Crown is two-fold, according to the First Nation. In the first place, Treaty 6, to which the Alexis Band adhered in 1877, promised reserve land to the Alexis Band, to be administered and dealt with for them by the Crown. In particular, the treaty provided that the Crown would retain the discretion to deal with any settlers within the bounds of the reserve and that the Crown could sell or dispose of reserve land for the benefit of the Indians with their consent.[249] As counsel for the First Nation stated,

> [a]ny time that we are dealing with issues concerning the use of Reserved lands, we are ultimately dealing with a fundamental Treaty promise, which was assurance of a homeland for future generations. That is a historic underpinning to the entire

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[249] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 29.

> fiduciary relationship. So the fiduciary relationship is not something that exists separate and apart or was created afterwards.[250]

According to the First Nation, both the *Royal Proclamation of 1763* and section 91(24) of the *Constitution Act, 1867*, underscore the Crown's role in protecting Indian lands from exploitation by third parties.

Second, the First Nation points out that the *Indian Act* sets out a scheme of complete control and absolute discretion by the Crown over reserve lands.[251] In this regard, states the First Nation, the Supreme Court of Canada has recognized the *Indian Act* as bearing "the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763"[252] – namely, that the Crown is "honour-bound to shield Indians from any efforts by non-natives to dispossess Indians" of their reserve land.[253] It is this complete discretion over dealings with reserve land, argues the First Nation, that gives rise to certain fiduciary duties on the part of the Crown. Whether in the context of a surrender, as in the Supreme Court of Canada case of *Guerin v. The Queen*, or in the context of a grant of a lesser interest, such as expropriation, as in the cases of *Kruger v. The Queen* or *Osoyoos Indian Band v. Oliver (Town)*, the Crown has interposed itself between third parties and the Indians to prevent their being exploited. As such, argues the First Nation, the Crown has created for itself a fiduciary duty to decide, in its sole discretion, where the best interests of the Indians lie and then to act in their best interests.[254]

Canada does not disagree with the First Nation that a fiduciary relationship exists in circumstances in which the Crown is alienating reserve land to a third party. The Crown, states Canada, has a fiduciary duty in relation to both surrenders and expropriations of reserve land. This duty consists of ensuring that the Band is properly compensated, "*as part of the obligation* to deal with the lands for the benefit of the Band."[255] Where Canada and the First Nation disagree is on the nature and scope of the fiduciary obligations that arose in these particular circumstances.

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[250] ICC Transcript, August 20, 2002, p. 14 (Trina Kondro).

[251] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 31.

[252] *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 at 226, [1990] 2 SCR 85 at 131.

[253] *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 at 226, [1990] 2 SCR 85 at 131.

[254] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 32, citing *Guerin v. The Queen* (1984), 13 DLR (4th) 321 at 340 (SCC); *Kruger v. The Queen* (1985), 17 DLR (4th) 591 at 597 (FCA); and *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 at 405 (SCC).

What then are the relevant components of the fiduciary obligation that the Crown owed to the Alexis Band as a result of the 1969 expropriation? The 1995 Supreme Court of Canada case of *Blueberry River Indian Band v. Canada,* commonly known as *Apsassin,*[256] since followed in *Semiahmoo Indian Band v. Canada,*[257] sets out a test for determining if the Crown has met its fiduciary duty in the context of a surrender. Under the surrender provisions of the *Indian Act*, it is the Band who ultimately decides whether to surrender its land. That decision is to be respected, stated McLachlin J (as she then was), unless the surrender would be foolish, improvident, or exploitative.[258] It is this test – namely, to ask whether the Crown has met the duty to prevent a foolish, improvident, or exploitative deal, that Canada relies on as the applicable test in a claim concerning expropriation.[259]

The First Nation, however, argues that the fiduciary obligation in a situation in which reserve land is to be expropriated is not confined to the prevention of exploitation, precisely because, unlike a surrender, an expropriation gives the First Nation no statutory right to refuse the transaction. In an expropriation, only the Crown gives legal consent and only the Crown and the expropriating authority are parties to the agreement.

In a letter dated April 23, 1996, to Mr Al Gross, federal negotiator, Specific Claims West, Mr Jerome Slavik, counsel for the Alexis First Nation, wrote:

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[255] Submission on Behalf of the Government of Canada, July 16, 2002, p. 19. Emphasis added.

[256] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193, [1995] 4 SCR 344.

[257] *Semiahmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 at 536 (FCA).

[258] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193 at 208, [1995] 4 SCR 344 at 371.

[259] Submission on Behalf of the Government of Canada, July 16, 2002, p. 21.

> In *Apsassin*, the Court found the Government had not breached any fiduciary obligation in its pre-surrender advice to the Band in that it had conducted appraisals and had been duly diligent in advising the Band as to the consequences of their surrender. They did, however, fail to act reasonably in the manner in which they disposed of the mines and minerals by failing to follow standard practices to ensure obtaining fair and reasonable value for their sale.[260]

Counsel for the First Nation points out that in the *Apsassin* case, the Blueberry River Indian Band had the statutory right to make the ultimate decision to surrender its reserve land and that, therefore, the Crown was restricted to a supervisory role to ensure that the transaction was not exploitative. Where the band is not the decision-maker, however, the First Nation argues that a more stringent test should be applied to determine the Crown's standard of care. The First Nation does not maintain that the duty to prevent exploitation is irrelevant, rather that the applicable test in a situation in which the Crown has the sole right to make the decision is to ask whether a reasonable person of ordinary prudence managing his own affairs would agree to the arrangement.[261]

This test was applied in *Apsassin* to the situation in which the Crown made a unilateral decision to transfer the mineral rights in surrendered land without the knowledge or consent of the band. McLachlin J stated:

> The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co.* (1976), 70 D.L.R. (3rd) 257 at p. 267, [1977] 2 S.C.R. 302, [1976] 6 W.W.R. 10. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.[262]

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[260] Jerome N. Slavik, Counsel, Ackroyd, Piasta, Roth & Day to Al Gross, Federal Negotiator, Specific Claims West, Indian and Northern Affairs Canada, April 23, 1996 (ICC Exhibit 3, p. 1).

[261] ICC Transcript, August 20, 2002, pp. 44–45 (Trina Kondro).

[262] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193 at 230, [1995] 4 SCR 344 at 401.

Based on the fact that both the decision to expropriate in this claim and the decision to transfer mineral rights in *Apsassin* were exclusively controlled by the Crown, the First Nation asks us to rely on the standard of the reasonable person of ordinary prudence managing his own affairs as the critical test for assessing whether the Crown met its fiduciary duty to the Alexis Band.

Canada relies instead on a different component of the Crown's fiduciary obligation in an expropriation of reserve land, as articulated in the recent Supreme Court of Canada case of *Osoyoos Indian Band v. Oliver (Town)*.[263] The Court held that "the fiduciary duty of the Crown is not restricted to instances of surrender"[264] and will attach to expropriations. As Canada points out,[265] Iacobucci J, writing for the majority, held that the Crown's fiduciary duty arises once the Crown determines that it is in the public interest to expropriate Indian lands. The Crown is then required to expropriate the interest required to fulfill the public purpose while preserving the Indian interest in land to the greatest extent practicable. It is known as the minimal impairment test.

> The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienation in the *Indian Act* which is to prevent the erosion of the native land base: *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119, 147 D.L.R. (4th) 1, at para. 52. The contention of the Attorney General that the duty of the Crown to the band is restricted to *appropriate compensation* cannot be maintained in light of the special features of reserve land discussed above, in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced.
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> As the Crown's fiduciary duty is to protect the use and enjoyment of the Indian interest in expropriated lands to the greatest extent practicable, the duty includes the general obligation, wherever appropriate, to protect a sufficient Indian interest in expropriated land in order to preserve the taxation jurisdiction of the band over the land, thus ensuring a continued ability to earn income from the land. Although in this case the taxation jurisdiction given to bands came after the Order in Council of 1957, *the principle is the same, namely that the Crown should not take*

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[263] *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 (SCC).

[264] *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 at 405 (SCC).

[265] Submission on Behalf of the Government of Canada, July 16, 2002, p. 25.

> ***more than is needed for the public purpose and subject to protecting the use and enjoyment of Indians where appropriate.*** [266]

We note that, although the *Osoyoos* case involved a section 35 expropriation, the factual circumstances in that case differ from those in the Alexis claim, effectively limiting the application of *Osoyoos* in this instance. In *Osoyoos*, the Supreme Court addressed the issue of whether lands taken by a section 35 expropriation remained in the reserve for the purpose of applying band taxation bylaws. The Court did not address the scope of the Crown's fiduciary obligations when negotiating a compensation package on behalf of the First Nation, which is essentially the issue before this Commission. Accordingly, we do not interpret the *Osoyoos* decision as setting out an exhaustive list of fiduciary duties required of the Crown in an expropriation. Rather, in our view, the decision, when applied to this claim, stands for the proposition that one of the Crown's duties is to ensure that the expropriating power takes no greater legal interest in the land than is necessary.

It is clear from the recent case law[267] that the Crown must act in the best interests of the Band in an expropriation of reserve land. As Canada acknowledges, the Crown has a duty, as part of its obligation to act in the Band's interest, to see that it is properly compensated. A corollary duty is to prevent the exploitation of the Band.

Even if the arrangement cannot be shown to be exploitative, however, we must apply the test of whether a reasonable person of ordinary prudence managing his or her own affairs would agree to the transaction. We are persuaded by the First Nation's argument that this test is applicable to a situation in which the First Nation is totally reliant on the Crown to negotiate a transaction with a third party for the alienation of reserve land. To adopt this test requires that we not only look at the adequacy of the deal from the perspective of the Band at the time, as Canada's counsel suggests,[268] but also apply an objective standard of the reasonable person managing his or her own affairs. In other words, would the Crown, acting as a reasonable, prudent person, with all the relevant knowledge available to it, have made the same deal for itself that it made for the Alexis Band?

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[266] *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 at 406 (SCC). Emphasis added.

[267] See, in particular, *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 (SCC), and *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (FCA).

[268] ICC Transcript, August 20, 2002, pp. 102–3 (Kevin McNeil).

Finally, the duty of minimal impairment also requires that the Crown ensure that no greater legal interest than necessary is transferred to the permittee.

We now turn to the specific questions that arise given the facts of this claim in order to determine whether the Crown breached its fiduciary obligations to the Alexis First Nation in permitting Calgary Power to expropriate reserve land in 1969 for a transmission line.

Issue I (b) Duty to Advise in Negotiations

Was there a duty to advise the Band of the relative strength of its bargaining position with Calgary Power in the negotiations for the 1969 transmission line and to keep the Band informed? If so, was that duty breached?

The only experience that the Alexis First Nation had had with Calgary Power prior to the discussions in 1968 leading to the 1969 transmission line concerned plans for two relatively small distribution lines that would provide electricity to the reserve. The rights of way for these distribution lines were granted pursuant to section 28(2) of the *Indian Act* and required both Band and ministerial consent. The section 28(2) permits were, according to the PHI report,[269] a common means of creating public utility easements on reserves. The *Land Management and Procedures Manual* of 1983 also identified section 28(2) permits as appropriate for distribution lines serving the reserve but not for transmission lines passing through a reserve and providing little or no service to the reserve.[270]

By comparison, the plan to construct a high voltage transmission line with towers across the reserve was a larger and very different proposition. Under Alberta legislation,[271] Calgary Power had the authority to take land required for a public purpose without the consent of the owner. In order to provide for expropriation of Indian reserve land under federal jurisdiction, section 35 of the *Indian*

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[269] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 27 (ICC Exhibit 6, p. 27).

[270] DIAND, Lands Directorate, Reserves and Trust, *Land Management and Procedures Manual*, September 1983 (ICC Exhibit 7, pp. 57, 68–69).

[271] *The Water, Gas, Electric and Telephone Companies Act*, RSA 1955, c. 361, ss. 30–33, as amended by SA 1956, c. 60, s. 4.

Act sets out a regime whereby the corporation possessing the legislative authority to expropriate can take reserve land with the consent of the Governor in Council. In the alternative, the Governor in Council can authorize a grant or transfer of the reserve land to the corporation.[272] Either way, Calgary Power was in a strong bargaining position with the Alexis Band Council in 1968. Even though DIAND policy at the time was to obtain the consent of the Band to an expropriation under section 35,[273] Band consent was not a condition precedent to the taking.

The first record of the Band's deliberations and agreement to allow the 1969 line was on March 4, 1968, when the Band Council passed a resolution authorizing Calgary Power to erect approximately 13 guyed towers and power lines across sections 11, 14, 23, and 26 of township 55, range 4, west of the 5th Meridian, in return for compensation of $100 per acre for approximately 41 acres. The right of way was to be 100 feet wide but the actual width of the clearing, according to the BCR, would be 150 feet, and band members were guaranteed the right to do all the clearing for $300 per acre for approximately 61 acres.[274] Unfortunately, we do not know what information the Band Council had before passing this resolution, nor can we confirm the name of the Calgary Power representative who discussed the plan with the Band or whether a DIAND official participated in the negotiations.

The circumstances surrounding the signing of the 1968 BCR are important because Canada points out that a memo dated March 29, 1968, from A.H. Murray, Acting Officer in Charge at the Edmonton-Hobbema District of DIAND, to R.D. Ragan, the DIAND Regional Director for Alberta, enclosing the BCR, is the first indication of DIAND's involvement in this matter. Counsel for Canada suggests that this memo and another memo dated March 15, 1968, from T.A. Turner, Superintendent in Charge of the Edmonton-Hobbema District, to Regional Director Ragan, regarding discussions between the Paul Band and Calgary Power concerning the same transmission line, are some evidence that Calgary Power had a practice of negotiating agreements with bands directly. This practice, Canada says, means that DIAND's involvement would only be triggered once the BCR was passed.[275] The Edmonton *Journal* account of the Band Council meeting that approved the transmission line right of way quotes an official from Indian Affairs who appeared to have been at the meeting;[276] however, his identity is unknown and his role, if any, in the negotiations between the Band and Calgary Power is not clarified by this evidence. It should also be noted that Turner expressed concerns that DIAND officials were not in attendance at the Paul Band discussions by advising Ragan that Turner's office "has notified the Council and Calgary Power that in dealings of this nature, a member of this Department will have to be present."[277]

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[272] *Indian Act*, RSC 1952, c. 149, s. 35.

[273] Vivian Little, "Guidelines on Expropriations," March 1994 (ICC Exhibit 7, pp. 7–9).

[274] Alexis Band, Band Council Resolution 1967-68/22774-25, March 4, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 367).

The elders were able to testify generally that it was the Indian Agent who would come out to the reserve, and that if DIAND needed a decision, the Agent would bring a prepared BCR to be signed. But no one knew the name of the Indian Agent at the time of the 1968 BCR. Phillip Cardinal believed that the Indian Agent was a person by the name of Cliff Sim and that it was he who brought a Calgary Power representative named Charlie [likely Shirley] Johnson to the reserve to discuss the terms of the right of way;[278] however, counsel for Canada advised the Commission that although Clifford Sim's signature appears on a sketch for the 1967 line,[279] DIAND has no record of his being an employee of DIAND:

> [t]hat could lead to another inference that Mr. C. Simms [sic] was an employee of C.P.L. [Calgary Power]. But we know that he wasn't an Indian agent with DIAND. So to answer your question, I think a reasonable inference could be made that the B.C.R. may have actually been negotiated between the Band and C.P.L.[280]

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[275] ICC Transcript, August 20, 2002, p. 80 (Kevin McNeil).

[276] Alma Keroack,"Conditions Improve for Indian Reserve – Democratic System Pays off at Alexis," Edmonton *Journal*, March 5, 1968, p. 9 (ICC Exhibit 10, p. 268).

[277] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, Indian Affairs Branch, March 15, 1968, Federal Records Centre, DIAND, file 774/331-3-7-133A-1, vol. 2 (ICC Exhibit 10, p. 271).

[278] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 23–24, Phillip Cardinal).

[279] T. A. Turner, District Supervisor, Edmonton-Hobbema District, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, April 25, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 203).

[280] ICC Transcript, August 20, 2002, p. 75 (Kevin McNeil).

Further, when Mr Cardinal was asked if Cliff Sim was the Indian Agent involved at the time that the transmission lines were being built, he replied that, "according to my recollection, there was none."[281]

Notwithstanding the lack of evidence concerning the identity and the role, if any, of the Indian Agent in the negotiations between the Band and Calgary Power, it is a troubling possibility that Mr Sim could have been a representative of Calgary Power in the discussions leading up to the BCR and that the Band Council believed him to be the Indian Agent.

We agree with Canada that the evidence points to the possibility that the power corporation negotiated deals with bands for major transmission lines with little or no knowledge or oversight by the Indian Agent. This possibility raises the question of whether the Alexis Band could have represented its own interests adequately in these discussions. At a minimum, this arrangement should have put DIAND officials on notice that the BCR may not have been the product of equal bargaining power and adequate knowledge of the possible options on the part of the Alexis Band Council. Certainly Turner was concerned enough to insist that a member of his department attend future meetings of this nature.

The First Nation points to one example of information that should have been available to the Alexis Band when it negotiated with Calgary Power for the right of way or to DIAND when it was assessing whether the deal was in the Band's best interests. They should have known, argues the First Nation, what it would have cost to obtain an alternate right of way around the reserve. Yet no evidence exists showing that Calgary Power divulged to DIAND, if not to the Band, the comparable cost of routing a line around the reserve when the corporation was applying for section 35 approval. As the First Nation states,

> [a] reasonably prudent person does not conduct negotiations oblivious to the strengths or weaknesses of her bargaining position. In failing to make this basic assessment, the Crown breach [sic] its fiduciary obligations to Alexis.[282]

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[281] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 53, Phillip Cardinal).

[282] Submission on Behalf of Alexis First Nation, May 24, 2002, p. 42.

Even though DIAND may not have been aware of the negotiations leading up to the BCR, it would have been possible in the following months for officials to revisit the agreement and with their knowledge of negotiations in matters of rights of way, determine whether this arrangement was fair to the Band. Canada rightly points out that DIAND did not rush to give immediate approval to the right of way, as is evidenced by the lapse of 15 months before finalizing the agreement and the exchange of memos among DIAND officials. We recognize, however, that, from the Band's perspective, there was very little contact with DIAND officials during this time.

Officials did meet with the Alexis Band Council on September 30, 1968, to present the plan of survey for the proposed right of way and, according to a memo from Turner to Ragan dated October 8, 1968, the Council approved the plan at this meeting.[283] The record also indicates that Turner wrote to Ragan on December 16, 1968,[284] indicating that he, Turner, had met with the Band Council and Calgary Power officials to discuss the terms of the right of way, using as a template an agreement that had been prepared for the Paul Band, and that it "meets with the satisfaction of all concerned." In this same letter, however, Turner states that they are unable to get the Alexis Band Council to "say definitely what they feel should be written into a contract such as this" but that the Band Council was favourable to an annual rental provision. Turner also asked that a draft agreement for the Alexis Band be drawn up so that he could sit down with the Band Council and Calgary Power to discuss it "clause by clause." Early in 1969, Ragan forwarded Turner's request to headquarters.[285] There is, however, no evidence that a meeting with the Band Council to review the Alexis agreement ever took place.

In conclusion, we find on the evidence that DIAND officials were likely not aware of the initial negotiations between Calgary Power and the Band and, thus, no opportunity arose at that time to advise the Band of the relative strength of its bargaining power. Officials must have been aware, however, after receiving the BCR that the Band could well have been at a disadvantage negotiating directly with Calgary Power. This would explain Turner's concern with the lack of departmental supervision in "dealings of this nature." As we have seen, departmental records described the Alexis Band as requiring considerable guidance for some time to come. In particular, the Indian Agent at the time would have been aware of the limited levels of education, literacy, and knowledge of the English language on the reserve.

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[283] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, October 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 296). See also J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, November 7, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 298).

[284] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

[285] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

In the circumstances, once the Crown learned of the BCR, it had a duty to scrutinize the deal made with Calgary Power, in particular to find out the cost of building an alternate route outside the reserve and to tell the Band Council. This knowledge would have also enhanced the bargaining position of the Crown in its meetings with Calgary Power on behalf of the Band. Consequently, the Crown was in breach of its duty to advise the Band of the strength of its bargaining position with Calgary Power, in particular by finding out the cost of an alternate transmission line route.

Issue 1(c) Duty to Obtain Independent Appraisal

Was there a duty to obtain an independent appraisal of the fair market value of the land to be expropriated for the 1969 line and advise the Band accordingly? If so, was that duty breached?

The First Nation argues, on the basis of McLachlin J's judgment in *Apsassin*, that a reasonably prudent landowner would never have agreed to the terms of compensation without conducting an independent appraisal of the land. This, they say, was not done. The First Nation contends that DIAND officials, in particular Ragan, only provided comparable numbers once the adequacy of the compensation was questioned by a DIAND official,[286] R.G. Young, Chief, Resources and Industrial Division, at DIAND headquarters.

Young was asked by the Deputy Administrator of Lands, J.H. MacAdam, for his "recommendations regarding the proposed easement, its location, and the terms of compensation."[287]

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[286] Submission on Behalf of Alexis First Nation, May 24, 2002, p. 43.

[287] J.H. MacAdam, Deputy Administrator of Lands, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, DIAND, April 17, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 284).

Young's reply, set out in full in Part II, is the first significant record of a concern within DIAND about the lack of analysis by the Alberta regional office and the adequacy of the compensation. Among the concerns identified, Young wrote: "The Region should provide more substantiation of the rental level and a review clause is needed."[288]

This letter led to a lengthy response from Ragan on behalf of another official, E.C. Holmes. Ragan indicated that Holmes had examined the market for farmland in the vicinity of the Wabamun [Paul Band] and Alexis reserves and set out five comparable sales of cultivated and non-cultivated land in 1968. The sales indicate a value of $70 to $100 per acre for cultivated land and $30 to $50 for uncultivated land. Using the "Blackstock formula" (150 per cent of the value of the land plus 10 per cent), an unofficial method developed by an Alberta judge for assessing the fair market value of easements, and assuming an average of $40 per acre for uncultivated land, Ragan concluded that $66 per acre would be considered adequate compensation.[289]

Canada relies heavily on this letter in both its written submission and oral argument as proof not only of the Crown's efforts to assess the value of compensation but also as evidence that the lump sum paid to the Band, $100 per acre for a total of $4,296, was more than adequate compared to values at the time. The only other evidence before the Commission was provided by the First Nation. Information obtained from TransAlta Utilities, the successor company to Calgary Power, indicates that the company paid $95 per acre to a private landowner for an easement over cultivated land adjacent to the Alexis reserve in 1969.[290] Canada concludes that this evidence corroborates the Crown's assessment at the time that the Band obtained adequate compensation when it was paid $100 per acre for undeveloped land.[291]

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[288] R.G. Young, Chief, Resources and Industrial Division, DIAND, to [J.H. MacAdam], Deputy Administrator of Lands, DIAND, April 24, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 285).

[289] R.D. Ragan, Regional Director of Social Affairs - Alberta, DIAND, to Indian Affairs and Northern Development, Ottawa, November 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 299).

[290] Chuck Meagher, Legal Counsel, TransAlta, to Ackroyd, Piasta, Roth and Day and Carole Vary, November 8, 2000 (ICC Exhibit 14, p. 5).

[291] Submission on Behalf of the Government of Canada, July 16, 2002, p. 21.

Whether the Crown sought out information on fair market values at the time in order to justify and defend its position, as the First Nation contends,[292] or Ragan had this information available to him already, the fact that the Crown did not retain an independent appraiser is not, in our view, tantamount to a breach of fiduciary duty in these circumstances. The fact remains that the Crown did compile information on land values in the area and did adjust them upwards to reflect a higher value for an easement and injurious affection. The record does not indicate Holmes's expertise in assessing land values for the department; however, the recent evidence that one adjacent property was valued in 1969 at $95 per acre for easement purposes satisfies us that, notwithstanding the lack of an independent opinion, the Crown acted reasonably and, with respect to the per acre value of the lump sum, might well have agreed to that amount for itself.

ISSUE 2 DUTY TO OBTAIN ANNUAL PAYMENT

Did the Department of Indian Affairs breach its statutory and/or fiduciary obligation to the Band by failing to obtain a reasonable annual fee, rental or charge as permitted in agreements between DIAND and Calgary Power?

As we indicated in Part III, to answer this question we have analyzed the subsidiary issues involved.

Issue 2(a) Was the 1969 Lump Sum Payment Exploitative?

Did the Crown have a duty to prevent an exploitative agreement in 1969? If so, was the 1969 transaction exploitative by providing for a lump sum payment rather than annual compensation to be renegotiated at periodic intervals, or a combination of both?

Background

We now come to a critical issue in this claim, the decision by Indian Affairs to approve the 1969 easement to Calgary Power based on a one-time lump sum payment. The Alexis Band Council had consented in a BCR to receive a lump sum of $4,296 from Calgary Power in return for providing a right of way to the company for a high-voltage transmission line using 13 towers across IR 133 from south to north. Over the 15 months that elapsed before final approval, the record shows that there was an active and intense debate among DIAND officials over the fairness of its policy of granting long-term interests on Indian reserves to utility corporations for lump sum consideration. Officials also debated the propriety of using section 28(2) permits to grant such interests, knowing that they were in reality grants in perpetuity. It is to this correspondence that we now turn to determine whether the Crown had a fiduciary duty to make efforts to improve the terms of the deal between the Alexis Council and Calgary Power or even to reject the arrangement outright. If the answer is yes, it had a fiduciary duty, and if the Crown breached that duty, was the resulting deal – a lump sum payment – exploitative?

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[292] Submission on Behalf of Alexis First Nation, May 24, 2002, p. 44.

As we have set out in Part II, the change in policy for utility rights of way began in the section of DIAND responsible for mineral rights, in particular pipeline rights of way. The correspondence, beginning in June 1967 with a memo from G.A. Poupore, Chief of Lands, Membership and Estate Division, indicated that pipeline rights of way would be subject to a new policy – namely, that

> all easements in perpetuity (as long as required) must be granted pursuant to the provisions of Section 35 of the Act [marginalia: "without surrender"] or by sale or lease following a surrender for that purpose. Inasmuch as there is no intention of adopting the latter method except in extremely special circumstances, Section 35 will be the means for granting easements to all bodies holding the power of expropriation in their charter.[293]

Poupore's memo was first sent to E.A. Moore, Supervisor of Minerals, in Calgary and then circulated in September 1967 to all regional directors with the notation that this was the policy to be followed for all oil and gas pipeline easements in future. R.D. Ragan, Regional Director for Alberta, was one of the recipients.

Moore then released a discussion paper, intended primarily for the oil and gas industry but also identifying general concerns about the existing policy of granting section 28(2) and section 35 interests. The text of his paper, sections of which are reproduced in Part II, contains a number of important statements that speak directly to an awareness, at least in the context of oil and gas pipelines, of the duty to ensure that grants of interests in reserve land to third parties are in the Indians' best interests.

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[293] G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, Department of Citizenship and Immigration, to Supervisor of Minerals, Indian Affairs Branch, Department of Citizenship and Immigration, June 7, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 206).

> The protection of Indians seems to revolve around that provision of adequate safeguards *to ensure that the Indian Bands will receive sufficient compensation in the form of initial payments and annual rentals* and to ensure that future developments on the reserve will not be hampered by the issuance of rights to companies in the form of easements, leases, permits, etc. It is our contention that the Indians should receive compensation which is commensurate with that received by non-Indians under similar circumstances.
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> ...
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> Usually Band Councils have signed resolutions requesting suitable documents to be issued by the Branch without being very specific in the wording of the resolution; however, at the same time being aware of the intent of an application for a lease, easement, right-of-way, etc. *Given proper guidance* their resolutions could be very specific as to length of primary term, renewals, compensation, etc.[294]

Moore recommends, among other things, that

> (5) Long-term contracts should be issued and subject to recommendation No. 6 *suitable clauses should be provided to allow review at suitable intervals respecting annual rent*, together with relocation in exceptional cases.
>
> (6) A hard look should be taken with respect to the necessity of specifying review periods as to additional terms of compensation. If it is legal and justifiable for a government to pass acts or regulations requiring payments on existing contracts there would be no need to specify review periods....[295]

The record does not indicate who received Moore's paper or whether it was read by regional officials such as Ragan, divisional chiefs at headquarters such as Poupore and Young, or possibly more senior officials such as the Assistant Deputy Minister R.F. Battle. Nevertheless, there was an awareness within the minerals' section that the terms of agreements should consider initial payments, annual rents, and review clauses. Further, we know that by February 1968 the Minister of Indian Affairs had turned his attention to this issue and expressed the opinion that the amount of compensation and the manner of payment for pipeline rights of way should be reviewed on a periodic basis.[296]

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[294] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, DIAND, "Surface Right-of-Entry to Indian Reserves – Petroleum Industry Easements, Rights-of-Way, Access Roads," November 28, 1967, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, pp. 244–54). Emphasis added.

[295] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, DIAND, "Surface Right-of-Entry to Indian Reserves – Petroleum Industry Easements, Rights-of-Way, Access Roads," November 28, 1967, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, p. 246). Emphasis added.

Still, at this time it is obvious that the process to amend departmental policy to better ensure adequate compensation for easements over reserves was very much in flux. For example, Moore wrote to Ragan on April 5, 1968, stating that the practice in Alberta was still to pay compensation "in the form of an initial payment covering severance, inconvenience and damage and there are few cases where provision has been made for additional compensation or the review of compensation."[297] Moore also criticized some new wording from the Lands Division of Indian Affairs as being too vague: it "indicates that additional payment will be necessary for the second period without stating what form the payment will take." Moore finished by advising Ragan that "there is a strong movement afoot amongst landowners in both Saskatchewan and Alberta to force the companies into payment of annual rents for pipeline easements.[298]

Knowledge of DIAND Officials

It was in this context that R.D. Young, Chief of the Resources and Industrial Division, turned his mind to similar rights of way for power transmission lines when he was asked for his views on the proposed line across the Alexis reserve. Moore's April 5, 1968, memo had referred to a meeting between Young, Ragan, and Moore on February 12, at which they arrived at a consensus that pipeline permits would continue to be granted pursuant to section 28(2) for as long as required but would be subject to a review of compensation at the end of each 20-year period. Young was aware of and supported the change of policy for pipelines.

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[296] J.H. MacAdam, Deputy Administrator of Lands, DIAND, to H.J. Brown, Land Manager, Alberta Gas Trunk Line Company Limited, March 29, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 276).

[297] E.A. Moore, Supervisor of Minerals,DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, April 5, 1968, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, p. 280).

[298] E.A. Moore, Supervisor of Minerals, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, April 5, 1968, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, pp. 280–81).

We view Young's letter of April 24, 1968, responding to the request for his views on the proposed easement across the Alexis reserve as critical evidence in this claim. The letter put MacAdam and Ragan on notice that the Chief of the Resources and Industrial Division was firmly of the view that the Alexis Band deserved an annual rental to be reviewed every five years or less, the whole subject to a 20-year term with a right to renew. Young wrote:

> [w]e should not grant such an easement under the conditions laid down in Clause 5 of the Band Council Resolution [ie. "for as long as the right of way is required for the purpose of Power transmission lines"]. The Region should provide more substantiation of the rental level and a review clause is needed. Perhaps the circumstances warrant a fairly permanent type of tenure for the line owners. However, there should be an annual rental of at least $5.00 per acre to be reviewed at intervals of not longer than five years, so that we can be assured of fair adjustments to current values and that a bona fide need exists – i.e. that the line is not simply abandoned. We can see no reason why a 20-year term with right to renew and 5-year rental reviews cannot apply here.[299]

This letter also triggered a series of exchanges between departmental officials at headquarters and the regional office that help to define the department's knowledge in these matters, and from which we can analyze the resulting fiduciary duty of the Crown.

First, Turner, the Superintendent in Charge of the Edmonton-Hobbema District, met with Calgary Power personnel and wrote to Young on June 14, pointing out that "[i]n Alberta it is standing practice for all Utility companies, pipe line, etc. to make one payment for easement before work starts and not pay annual rental."[300] At this very moment, in a parallel scenario on the Paul Band's reserves at Wabamun, MacAdam, the Administrator of Lands for DIAND, was telling Ragan that:

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[299] R.G. Young, Chief, Resources and Industrial Division, DIAND, to [J.H. MacAdam], Deputy Administrator of Lands, DIAND, April 24, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 285).

[300] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, DIAND, June 14, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 286).

> in continuation of its policy to secure the highest return to the Indian people for rights given up in their Reserves, the Branch prefers to approve the grant of rights to use Reserve land for either a short term at a fixed compensation in line with current land values, or for a long term with a sliding scale of compensation to be determined from time to time by negotiation.[301]

MacAdam also told Ragan that the BCR passed by the Paul Band "is an example of the inequitable situation the aforesaid policy endeavours to eliminate." Nevertheless, MacAdam backed away from directing Ragan to try to reopen negotiations between the Paul Band and Calgary Power. Instead, MacAdam left it to Ragan to assess the likelihood of getting the terms of the transaction amended and, if unlikely, to put in a memo the fact that these circumstances are "sufficiently exceptional" to warrant the alienation of rights for a term that may be construed as in perpetuity at a compensation that equals present land values.

Meanwhile, Young continued the exchange of views on utility rights of way when he wrote to Ragan on September 5 criticizing Turner's response. Young stuck to his position that the practice referred to by Turner "must change and, in fact, is changing," and enclosed examples of draft agreements requiring a review period after 20 years. He then stated what he believed to be the department's responsibility in these matters:

> Our responsibility is to protect the Indian interest, and this is not being done when permanent alienation is granted for a fixed sum unless a sale is involved.[302]

Ragan replied to Young on November 8, 1968, with the memo, discussed under Issue 1(c) above, that set out the particulars of the five comparable transactions and the calculation of easement compensation using the Blackstock formula. In Ragan's view, the lump sum compensation offered to the Alexis Band of $100 per acre, or $4,296, was more valuable than a short-term annual rental because the latter would bring in only $3 to $5 per acre and the company would reject any payment for injurious affection since the lands were undeveloped. Ragan concluded that the "short term renewable agreement is not in the best interest of the Indian people in this particular case."[303] We note, however, that Ragan, drawing on information supplied by E.C. Holmes, considered a lump sum payment and annual rentals to be alternative options, whereas Young had identified them as possible coexisting terms of an agreement.

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[301] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, June 24, 1968, Federal Records Centre, DIAND, file 774/31-3-7-133A-1, vol. 2 (ICC Exhibit 10, pp. 287–88).

[302] R.G. Young, Chief, Resources and Industrial Division, DIAND, to R.D. Ragan, Regional Director – Alberta, DIAND, September 5, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 292).

By the end of the year, both Turner and Ragan, both of whom were aware of the Band's indecision and possible wish to have a renewable arrangement, wrote memos suggesting ways in which the Band Council could impose an annual rental or a tax on the property.[304]

In January 1969, departmental officials began to draft the proposed permit pursuant to section 28(2). The evidence regarding the initial draft of the permit, in which the lump sum payment of $4,296 was limited to a 20-year term, after which the parties would negotiate a further amount, indicates that the drafter of the permit, R.J. Pennefather, believed he was to make these amendments to the Alexis transaction. As we have seen, however, they did not survive the final draft.[305] Pennefather also penned a draft memorandum for MacAdam's signature explaining the changes. He stated that he had followed the standard practice in relation to oil pipeline agreements in Alberta and, further, that "it is my responsibility to assure that (a) maximum revenue to the Band in the short run together with (b) provision for review at reasonable intervals of the compensation payable, are included in the Agreement."[306] Like the draft agreement, however, the draft memorandum was amended to delete the reference to a renewable term before it executed.

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[303] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [R.G. Young], Indian Affairs, November 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 300).

[304] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315); R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

[305] Draft Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., ca. January 17, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 308–9)

[306] Draft memorandum from J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, undated, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 472).

DIAND's Policy Review

The formal review of departmental policy concerning long-term easements on reserve land for major transmission facilities commenced in May 1969 with a letter to all regional directors from J.W. Churchman, Director of the Indian-Eskimo Economic Development Branch. He expressed concern that, insofar as the lands affected by such easements were no longer available to the Band or were injuriously affected in respect of future development, "current practices are inconsistent with the policy of no sale or alienation of Reserve lands."[307] In launching the examination into the policy, Churchman also noted that a few band councils had recently negotiated agreements on a rental review basis, but that the practice was not widespread enough to evaluate the effect of adopting a general policy along such lines.

It is not necessary to review in any detail the varied responses received by DIAND from May until September 1969 when the new policy was adopted. A summary of the views of regional officials is contained in Part II. What is important is that the majority of regional directors supported the implementation of short-term agreements with review periods. These responses illustrate that there was widespread knowledge and understanding among regional officials of the inequities of the current policy as it affected Indian bands. But, regardless of the policy in place within DIAND, our primary concern is the actual knowledge possessed by the officials who were directly responsible in 1968 and 1969 for acting in the best interest of the Alexis Band and for recommending a course of action that would most closely reflect that interest.

We note, however, that senior officials did address the problem of how to handle negotiations that were already underway during the policy review period. The Assistant Director of the Indian-Eskimo Economic Development Branch, C.T.W. Hyslop, annotated a memo he had received from H.T. Vergette, Acting Chief of the Lands Division at that time, that he (Hyslop) was of the following opinion:

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[307] J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, to Regional Director, DIAND, May 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 324-25).

> Where the Region has already entered into negotiation with the company with the consent of the Band Councils on a non-renegotiable basis I do not think that we should make any changes in agreements already approved or under negotiation....[308]

Although in June Hyslop was content to let sleeping dogs lie when it came to bands and utility companies that were already in negotiations on the terms for a right of way agreement, by August he appeared to support the need for a new policy for future transactions. In a further memo to Vergette, Hyslop commented:

> It has been the Department's recent policy I understand not to alienate land for long periods of time either by lease, easement, permit, right-of-way or other occupation without opportunity for renegotiation of compensation. *This I believe is viewed as part of the trust function* where resistance is given for the most part to alienation by fee simple or otherwise unless the land use is clearly in the public interest as for instance in the case of public roads or highways where the Indian reserve lands benefit from such alienation.[309]

Although the meaning of Hyslop's direction to Vergette on how to handle new easement transactions pending the adoption of a revised policy is somewhat unclear, Hyslop appeared to suggest that the "recent policy" of not alienating land indefinitely without a review period should be followed in order to get "the best possible terms for the Indians," even though it would "not be popular with utility companies."[310]

Thus, at the director and assistant director level within DIAND, officials were mandated to come up with a new department-wide policy to better protect the Indians' interest in matters of rights of way for transmission lines. On a parallel stream, the officials responsible for overseeing the transaction concerning Calgary Power and the Alexis Band, notably Young, MacAdam, and Ragan, recognized that the Band had not negotiated the best possible terms for itself. Yet, on the recommendation of Ragan, the Regional Director for Alberta, the decision was made at headquarters to proceed with the approval of the right of way permit over IR 133 for a lump sum payment only. M.G. Jutras, writing on behalf of Ragan, justified the recommendation on the basis that it was "in accordance with the Band Council's wishes and further substantiated by our previous memo on the subject."[311]

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[308] Handwritten marginal note from C.T.W. Hyslop, Assistant Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, Indian Affairs Branch, DIAND, on letter of June 6, 1969, from Vergette to [Hyslop], Assistant Director, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 336).

[309] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, DIAND, August 11, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 356). Emphasis added.

[310] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, DIAND, August 11, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 356).

On September 24, 1969, the very day that Hyslop released the department's new policy on rights of way over reserve lands for transmission line purposes, the Minister of Indian Affairs forwarded the recommendation concerning the Alexis Band to the Privy Council.[312] The Order in Council approving the right of way over the Alexis reserve was granted on October 1, 1969. Unlike the 1959 and 1967 distribution lines, the grant was pursuant to section 35 of the *Indian Act*.

The new policy preceded the Alexis approval by one week but did not apply to it. The new policy required a review of compensation at least every 20 years, subject to attempts to negotiate shorter review periods. It required officials from the development and land use sectors of DIAND to provide advice to band councils and also specified that staff were to explain the long-term advantages of being able to renegotiate rentals. Finally, and most relevant to this claim, the policy advised regional directors that, with respect to negotiations that were already or almost complete on the basis of a lump sum payment, "we will be unable to refuse these agreements entered into in good faith."[313]

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[311] M.G. Jutras, Assistant Regional Director – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, July 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 348).

[312] Jean Chrétien, Minister of Indian Affairs and Northern Development, to Governor General in Council, September 23, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 359–60).

[313] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to Regional Director, DIAND, September 24, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 362–63).

Findings

The totality of the evidence, most of which is contained in DIAND records, leads us to the conclusion that the majority of officials concerned with the Alexis transmission line agreement knew or ought to have known that the terms of the Alexis Band Council Resolution were unjust and not in the Band's best interest. We have no hesitation in stating that certain individuals, including R.G. Young, were determined to obtain the best possible deal for the Alexis Band and acted responsibly throughout. Why Young's advice was ignored and why the Alberta Regional Director's views were preferred is unknown. What is important is the fact that Young's advice and the results of DIAND's policy process were known by the very people with the mandate to provide a recommendation to the Minister of Indian Affairs on the approval of the Alexis permit.

The terms of a departmental policy, old or new, cannot shield the Crown when it concerns the Crown's duty to First Nations. In this instance, there was a sufficient pool of knowledge within DIAND of the inadequacies of the current policy that the Crown's agents had a duty to try to have the deal renegotiated, to provide for either annual payments subject to review or a combination of a lump sum and annual payments. The record shows that Turner met with only one of the parties, Calgary Power, in June 1968, and only visited the reserve some three months later to get Band Council approval for the plan of survey.

Turner's evidence – that he went back to the Band Council for a second time some time prior to December 16, 1968, and reported that it was satisfied with the arrangement – would carry considerable weight if not for the comment in the same memo that the Band was indecisive about what it wanted. This must be interpreted in light of the absence of any evidence that officials met subsequently with the Band Council to discuss the reasons for its indecision or that officials followed up with Turner's request to draw up a draft agreement for further discussion with the Band and Calgary Power. For these reasons, we do not interpret Turner's statement that the Band was satisfied with the arrangement as evidence that the Band Council had been given information and advice about its options and was making an informed decision.

Similarly, we find that the most reasonable interpretation of Jutras's remarks (on behalf of Ragan), that the recommendation to proceed with a lump sum was "in accordance with the Band's wishes," is that he was referring to the Band's original wishes as expressed in the BCR, not the product of subsequent advice from DIAND officials.

Not only did DIAND officials have a duty to negotiate a better deal on behalf of the Band, if possible, they also had sufficient time to do so, given the 15 months between the BCR and final approval of the transmission line right of way. In addition, the Alexis Band Council would have relied heavily on DIAND advice in order to understand the options that were available for the purpose of negotiations. Yet, while DIAND officials were locked in a heated debate over its policy on transmission line easements, we find little evidence that any of this information was ever shared with the Band Council. The Council was kept in the dark regarding its options and continued to be motivated primarily by the short-term jobs that the right of way would bring its way.

It was unfortunate for the Alexis Band that the timing of these events coincided with a transition to a departmental practice that would have better protected its interests. Nevertheless, the duty to act when there was the opportunity to intervene on behalf of the Band remained.

Canada argues that, even if the Band or DIAND had pressed for different terms, utility companies were not in the practice of paying annual fees in addition to a lump sum payment to residents either on or off reserve.[314] That may be true, but there is evidence showing that, first, there was already a movement among Alberta landowners to get better terms for pipeline rights of way and, second, departmental officials were starting to acknowledge that, as Young wrote to Ragan on September 5, 1968, "[n]aturally, there is some resistance from Companies but they will accept these Agreements.[315] In the case of the Alexis reserve, it is quite possible that Calgary Power would have renegotiated the deal with the Band and the Crown if that alternative had been cheaper than routing the transmission line around the reserve. Yet the correspondence, in particular the views expressed by some Alberta regional officials, suggests that the Crown was willing to acquiesce to the commercial interests of Calgary Power and put the Alexis Band's interests secondary.

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[314] Submission on Behalf of the Government of Canada, July 16, 2002, p. 22.

[315] R.G. Young, Chief, Resources and Industrial Division, DIAND, to R.D. Ragan, Regional Director – Alberta, DIAND, September 5, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 292).

Counsel for Canada would have us conclude, based on a 1974 departmental chart,[316] that DIAND officials used the approach of presenting different options, with their advantages and disadvantages, to bands contemplating an offer of compensation for a right of way. "So it is just a question of balance and a question of judgment," stated Canada's counsel, and "the Band itself influences the ultimate decision that was made."[317] This particular evidence, however, is too remote from the events in question to attribute to it any weight. It was written in 1974, some six years after the Alexis negotiations, and concerns another band. It illustrates that by 1974 DIAND was putting forward scenarios that included renewable terms and a combination of a lump sum and annual payments, but it sheds no light on the advice, if any, that DIAND was providing to bands in 1968, in particular to the Alexis Band.

Nevertheless, Canada asks the Commission to find that the Crown acted in the best interest of the Alexis Band in discharging its fiduciary duty, in that the Crown considered the wishes of the Band as expressed in its BCR, considered a lump sum versus an annual rental, conducted a study of land values, and concluded that the transaction was not exploitative.[318]

We respectfully disagree with Canada's conclusion. The Crown's agents knew by 1968 and 1969 that lump sum compensation for an interest whose term is ascertainable but virtually permanent was inadequate. The totality of the evidence contained in departmental memos persuades us that the decision to approve the permit for the 1969 transmission line based on a lump sum payment was made, not because the Crown believed that the deal did not exploit the Alexis Band, but because the transaction had already been negotiated, it reflected the new policy directive on transactions that were already in negotiation, and the Band had given its written consent in the form of a BCR. We find that the Crown had a duty to prevent an exploitative transaction, as enunciated in *Apsassin*, but instead made a deal with Calgary Power that was exploitative of a vulnerable and dependent Band.

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[316] J.H. Ready, Superintendent, Economic Development, Edmonton-Hobbema District, DIAND, to A/Head, Land Transaction Section, DIAND, June 11, 1974, Federal Records Centre, DIAND, file 774/31-3-7-133A-1, vol. 2 (ICC Exhibit 10, p. 444).

[317] ICC Transcript, August 20, 2002, pp. 87–90, at p. 89 (Kevin McNeil).

[318] Submission on Behalf of the Government of Canada, July 16, 2002, p. 25.

We agree with the First Nation that the Crown knew that some form of annual charge was necessary to ensure fair compensation for the Alexis Band. As counsel for the First Nation stated,

> I'm not asking you with 20/20 hindsight to look back and judge compensation at that time. I'm saying, look at what is happening in the department, the opinions that are being expressed at precisely that point in time, and that evidence itself is pointing to the inequity of the compensation that was provided in 1969. *It is the department's own evidence that speaks to the inequity of the compensation....*[319]

Yet, says the First Nation, the department wrongly followed the advice of one person, Ragan, over the views of the majority in DIAND.[320]

Even if the agreement for a one-time lump sum payment was not exploitative, we have agreed with the First Nation that the Crown must also meet the standard set by McLachlin in *Apsassin* – namely, whether a reasonable person of ordinary prudence managing his own affairs would agree to this arrangement. We find on the evidence that, bearing in mind the Crown's competing obligation to act in the public interest, its unilateral authority to approve rights of way, and its knowledge by mid-1969 that lump sum transactions were inadequate, the Crown would have attempted to renegotiate a more advantageous arrangement for itself. The Crown therefore breached its fiduciary duty by permitting Calgary Power to take advantage of the Band's weakness to strike a substantially unfair bargain and by failing to apply its own wisdom and knowledge to the terms of the transaction.

We now come to a set of questions that deal directly with the authority provided to the Alexis Band to impose a property tax on the permittee, Calgary Power, in respect of its rights of way across IR 133.

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[319] ICC Transcript, August 20, 2002, p. 37 (Trina Kondro). Emphasis added.

[320] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 46.

Taxation Provisions and Minimal Impairment

The Crown inserted into the permits covering the rights of way for the 1959 and 1967 distribution lines a provision that states:

> That the Permittee shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the said electric power transmission line or the use by the Permittee of the said lands.[321]

In the Agreement appended to the Order in Council granting the right of way to Calgary Power for the 1969 transmission line, a similar clause appears:

> That the Grantee shall pay all charges, taxes, rates and assessments whatsoever payable by the Grantee or any occupant of the right-of-way which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the works or the use by the Grantee of the right-of-way.[322]

Although the taxation clause appears in all three agreements, the questions relating to the Crown's fiduciary duties, if any, to ensure that the Band received revenue in the form of taxes concern primarily the 1969 transmission line.

The record is deficient in a number of areas. First, there is no evidence before us explaining the policy and legal reasons for the apparent widespread use of this clause in easement agreements, apart from Canada's statement that inclusion of a taxation provision in an easement agreement was part of the Crown's duty to minimally impair the Band's interest.

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[321] Agreement between Her Majesty the Queen, represented by the Minister of Citizenship and Immigration, and Calgary Power Ltd., November 9, 1959, DIAND, Indian Land Registry, Registration No. R11437 (ICC Exhibit 10, pp. 130–35); Agreement between Her Majesty the Queen, represented by the Minister of Citizenship and Immigration, and Calgary Power Ltd., July 4, 1967, DIAND, Indian Land Registry, Registration No. 055615 (ICC Exhibit 10, pp. 212–17), amended by Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., February 12, 1968, DIAND, Indian Land Registry, Registration No. L1117 (ICC Exhibit 10, pp. 262–64).

[322] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., October 1, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 369–72).

Second, the historical record contains no information confirming that DIAND officials explained the terms of the agreement to the Band Council or even sent a copy of the Order in Council and attached Appendices to the Band. Phillip Cardinal testified that they "did not get any kind of a documentation that says that there is an agreement between the Band Chief and Council and Calgary Power or any other document."[323] The testimony of Chief Alexis also suggests that band leaders knew nothing of the taxation provision inserted into the 1969 Agreement and had no understanding of taxing third parties:

> I don't remember anybody talking about taxation or taxation bylaw. Just recently, in the '80s I think, we come to understand taxes, and we've – in the '90s we're try [sic] to develop our own taxation bylaw and it took us about almost ten years to get it into place. It was done just recently, but it was started a long time ago.
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> But at that time [in 1969] I don't think there was an understanding of taxes or anything because we were supposed to be tax exempt....
> [W]e didn't even have policies then let alone taxation bylaws.[324]

Given the evidence of the lack of education and legal advice on the reserve at that time, together with the testimony that the people had no awareness or understanding of their right to tax Calgary Power, it is reasonable to infer that DIAND did not make efforts in 1969 or for some years thereafter to inform the Band of its taxation power in the 1969 Agreement. Canada does not disagree with this interpretation but, as we shall discuss below, argues instead that there was no duty to inform the Band of its taxing authority because the Band was legally prevented by the *Indian Act* from exercising it.

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[323] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 58, Phillip Cardinal).

[324] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 54, Chief Francis Alexis).

Issue 2(b) Duty to Obtain Assessment of Taxes
Was there a duty to obtain an independent assessment of the taxes, rates, charges, or fees being paid by Calgary Power to adjacent jurisdictions for the right of way for the same 1969 transmission line? If so, was that duty breached?

Some evidence exists to indicate that the Crown was contemplating some form of tax structure for easements on reserve lands almost one year before the 1969 line was approved. Turner wrote to Ragan on December 16, 1968, concerning the Alexis reserve, advising him that as a result of an amendment to the *Municipal Government Act* of Alberta, "we shall have to look at some type of tax structure, as these installations will be no longer assessed by the Department of Municipal Affairs, as they belong to an Indian Reserve."[325] Ragan in turn sent Turner's memo to MacAdam at headquarters with a covering memo, stating:

> I think it only right that the Band Council should levy a tax on property owned by Calgary Power on the reserve, particularly as the Province has vacated the field. Whether or not it is practical to levy such a tax as a form of rental I am not too sure. It might be more equitable to assess the improvements and to establish a mill rate equal to that of the Municipal District or County. You may have some thoughts in this regard.[326]

The advice on taxation from Turner and Ragan met with an unsympathetic response from MacAdam on April 9, 1969. Although MacAdam took pains to remind Ragan that it was MacAdam's duty to obtain maximum revenues for the Band, he advised Ragan that the lump sum offer of $4,296 bore "no relation to taxation by the Band Council in order to raise revenue for authorized municipal administration costs...."[327] MacAdam's comments imply that, even though DIAND ensured that the clause was in easement agreements, it considered its responsibility to have ended there. MacAdam then shut the door on further discussion by offering this opinion:

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[325] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

[326] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

[327] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, April 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 321–22).

> I have reason to believe the Power Company, while having negotiated in good faith, is not expecting at a later date, it should have to pay taxes levied by the Band Council in addition to the compensation moneys already agreed upon. It may well be that in this expectancy, the Company would have altered substantially its offer on a per acre basis.[328]

This paragraph replaced the draft wording prepared for MacAdam by Pennefather in which he wrote the opposite conclusion, that the company would and should assume its fairly assessed and taxed share. MacAdam ended his letter by suggesting that the matter of taxation in general deserved further serious consideration and that it could be part of the preliminary negotiations, presumably between utility corporations and bands.

The First Nation argues that, "having determined that tax should be levied to ensure fair compensation to Alexis, the Crown had a duty to find [out] what that amount would be," but no evidence exists that the Crown made any efforts to determine, for example, a mill rate equivalent to that used for the adjacent municipality.[329] The First Nation further states that, given that the Crown contemplated a tax as part of the consideration due to Alexis, the Crown failed to follow standard off-reserve practices of local governments by failing, among other things, to obtain annual revenues for the Band through the imposition of a tax.

Canada maintains that the First Nation cannot rely on what it calls the "standard off-reserve practices" of adjacent jurisdictions when it has presented no evidence to substantiate its allegation that it was standard practice in adjacent municipalities and improvement districts to obtain an annual charge or fee.[330]

Canada is correct in arguing that the record is deficient on this point. The First Nation, however, did provide an example of the research that the Crown could have undertaken in 1969 to arrive at a scheme to bring tax revenue to the Band. In preparing its claim, the First Nation asked Fenton Associates Consulting Inc. to provide an estimate showing the taxes that would have been payable since 1968 on the transmission line. The study used tax rates available from Alberta Municipal Affairs, TransAlta Utilities, and Lac Ste Anne County. The numbers show that, if the land had been liable to taxation by Lac Ste Anne and if Alexis had had a taxation bylaw in place, using these rates as a guide, the Band would have received tax revenue for the 6.24 kilometre right of way of approximately $62,000 between 1968 and 1999, the year that Alexis implemented its first taxation bylaw.[331] This document is some evidence that assessment and tax rates for off-reserve locations in the area were available and, more important, that a portion of the same power line that was not a part of the reserve until 1996 had been subject to taxation at these rates as part of Lac Ste Anne County's assessment.

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[328] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs Alberta, DIAND, April 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 321-22).

[329] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 44.

[330] Submission on Behalf of the Government of Canada, July 16, 2002, p. 22.

From the evidence available, we can ascertain that the Crown could have researched the terms of a suitable tax regime on behalf of the Band but did not do so because there was no agreed-upon policy to become involved in the implementation of tax schemes on behalf of bands. In circumstances in which a band had received adequate compensation, this failure to act might not have been a breach of a fiduciary duty; however, in the case of the Alexis Band, we are of the view that an annual return with periodic reviews was recognized by the Crown as necessary to provide adequate compensation to the Band. It therefore became part of the Crown's duty to investigate all possible alternatives, including taxes or grants in lieu of taxes, in order to protect the Indians' interest in the agreement that the Crown had negotiated with Calgary Power.

The Alexis Band was not aware that adjacent, non-reserve jurisdictions were receiving tax revenues from Calgary Power for the next three decades. The Crown, in contrast, could have obtained this information readily and considered its and the Band's options. By not doing so, it breached a fiduciary duty to the Band.

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[331] Allan Fenton, Assessor, Fenton Associates Consulting Inc., to Jerome Slavik, Ackroyd, Piasta, Roth & Day, September 6, 2000 (ICC Transcript, Exhibit 14, p. 11).

Issue 2(c) and (d) Duty to Obtain Annual Revenues and Minimally Impair

Was there a duty to obtain annual revenues by means of taxes on Calgary Power? If so, was that duty breached?

Was there a duty to minimally impair the Band's interest in the reserve lands granted to Calgary Power for the 1969 right of way? If so, was there a breach of that duty?

From the perspective of the Alexis Band, the lump sum payment of $4,296 and the promise of jobs to clear the 1969 line may have seemed like a good bargain, given the poverty and unemployment on the reserve. But the Alexis Band Council lacked information in a number of key areas. First, it did not know the strengths and weaknesses of Calgary Power's bargaining position. Second, it did not know what the Crown knew, that by 1968 agreements with pipeline and utility companies providing for lump-sum payments in return for a long-term interest in reserve land were recognized as inadequate compensation to bands. Third, it did not know that adjacent municipalities would impose annual taxes or similar charges for the same transmission line. Finally, it appears that it did not even know that the Crown had written into the permit a taxing provision that would enable the Band itself to collect taxes or other charges in future from Calgary Power.

DIAND officials knew all of these things. They also knew that even though a taxing clause had been written into the permit, the Alexis Band would have been barred by the *Indian Act* from implementing this clause. Prior to amendments to the *Act* in 1988, a band council was permitted to make bylaws for the assessment and taxation of interests in reserve land only if the Governor in Council declared that the band had "reached an advanced stage of development" and the Minister had approved.[332]

Paradoxically, the only option that the Crown provided to the Alexis Band that could have remedied the problem of inadequate compensation was the very power that was denied it until that provision was amended 20 years later.[333] According to Canada,

> no Order in Council declaring that the Band had reached an advanced stage of development was located. The evidence is to the contrary, namely, the counsellors

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[332] *Indian Act*, RSC 1952, c. 149, s. 82(1), as amended by SC 1956, c. 40, s. 21.

[333] *Indian Act*, RSC 1985, c. I-5, s. 83.

> of the day (1969) were illiterate and totally relied upon the Crown for advice and direction.[334]

With that assessment the First Nation entirely agrees, noting:

> At the same time that the Crown was looking at tax it was describing the Band as in need of guidance to attend to its affairs with basic competence. Obviously, this was not a Band that Canada was going to assess as being at an "advanced stage of development" at any time soon.[335]

The First Nation makes the argument that the Crown had the sole discretion to allow the Alexis Band to implement a tax on Calgary Power because of the limitation in section 82 of the former *Indian Act.*[336] According to the First Nation, when Canada entered into the agreement with Calgary Power knowing that the taxation power was unavailable to the Band, Canada should have worked with the Band to implement a tax regime or restructured the agreement with Calgary Power to provide for some form of annual payment.[337]

Canada concludes that the legislative bar to exercising the Band's taxation power means that no fiduciary duty existed to advise the Band of its power or to assist it in any way to implement a taxation scheme.[338] Canada argues that the only fiduciary obligation regarding taxation in these circumstances is a duty to minimally impair the interest in the land and this, says Canada, was satisfied when the Crown preserved the Band's taxation jurisdiction. The Crown, says Canada, met its duty to minimally impair the Band's interest, as articulated in the *Osoyoos Indian Band v. Oliver (Town)* case, by inserting the taxation clause into the permit and had no further fiduciary duty to advise the Band or implement a taxation scheme.[339]

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[334] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.

[335] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 44.

[336] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 47.

[337] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 40.

[338] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.

[339] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.

As we noted above, the *Osoyoos* case concerned the authority of the Osoyoos Indian Band to tax land within its reserve on which an irrigation canal had been constructed, pursuant to an expropriation under authority of section 35 of the *Indian Act* in favour of the Province of British Columbia. The issue concerned whether the expropriated land became surrendered land or remained part of the reserve. The majority held that only a statutory easement had been granted and the land remained reserve land, thereby enabling the Band to impose a property tax on the province. The case did not deal directly with the question of whether there was a positive fiduciary duty on the Crown to take steps to enable the Band to implement a taxation regime when it inserted the taxation clause into the permit. Nevertheless, when applied to the facts of this claim, the principles cited by Iacobucci J, speaking for the majority, are helpful.

After concluding that the fiduciary duty of the Crown is not confined to instances of surrender, Iacobucci J reasoned that, in the case of section 35 expropriations, a fiduciary duty arises on the Crown to grant only the minimum interest required to fulfill the public purpose, thereby ensuring minimal impairment of the band's interest. After reviewing the special features of the Indian reserve lands that take them outside the realm of standard commercial transactions, notably their unique cultural component and the fact that the band cannot unilaterally replace reserve lands, Iacobucci J concluded that the Crown's duty is not simply confined to ensuring appropriate compensation.[340]

We note that the findings of the majority are premised on the fulfillment of two fiduciary duties, the first, to ensure that appropriate compensation is received, and the second, to ensure that the band's taxation jurisdiction is preserved in order to enable "a continued ability to earn income from the land." The duty translates into not taking a surrender when an easement will suffice and in preserving the band's ability to tax the company that is occupying reserve land. As we indicated earlier, however, *Osoyoos* is limited in its application to this claim in that it does not set out an exhaustive list of the possible duties owed in an expropriation.

We agree with Canada that the Crown met the duty to minimally impair the Alexis Band's interests. In the 1969 transmission line claim, however, the Crown did not fulfill another duty articulated in *Osoyoos*, the duty to ensure that the Band received appropriate compensation, given the Crown's own understanding of what constituted adequate compensation at that time. Having failed to provide for annual returns to the Band in the agreement with Calgary Power in addition to or instead of a lump sum payment, the only viable recourse open to the Crown was to make efforts to enable the Band to receive tax revenues pursuant to its taxing authority. This the Crown failed to do.

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[340] *Osoyoos v. Oliver (Town)* 2001, 206 DLR (4th) 385 at 406 (SCC).

By comparison, the terms negotiated by the Crown for the 1959 and 1967 distribution lines were found to be adequate. The Crown, therefore, had no further duty with respect to those agreements to assist the Band to obtain tax revenues, although the Crown should at least have advised the Band that this power existed and would be available once the Band had the capacity to exercise it.

What steps could the Crown have taken to ensure that the Alexis Band received annual tax revenues from Calgary Power in light of the prohibition on "less developed" bands collecting their own taxes? Once the opportunity to restructure the agreement with Calgary Power had passed, the Crown ought to have found ways to bring tax revenues to the Band using the taxation clause. The Band itself was barred from taking this step and, as a practical matter, it is doubtful that it would have had the capacity to do so on its own. But by negotiating the taxation clause with the full knowledge that the Band could not exercise it, the Crown placed itself in a position in which it had a duty to collect the taxes or payments in lieu of taxes on behalf of the Band. Although this may not have been common practice with respect to utility interests on reserves, the circumstances of this Band and the timing of the agreement between DIAND and Calgary Power point to the necessity of the Crown taking remedial action to preserve the Band's best interests. Precedent for the collection of taxes or similar payments on behalf of bands can be found in the Crown's practice of collecting royalties on behalf of bands with oil, gas, and mineral interests, and DIAND's receipt of revenue from agricultural leasing agreements on behalf of bands. We also note that the report from Fenton Associates indicates that TransAlta Utilities paid "tax equivalencies on behalf of Alexis to INAC

[DIAND] for tax years 1997, 1998, 1999 and 2000," in respect of a portion of the transmission line on land that was recently added to the reserve.[341]

Issue 2(e) Duty to Assist with Taxation Bylaws
Was there a duty to assist the Band to draft and implement appropriate taxation bylaws in the years following approval of the permit for the 1969 line? If so, was there a breach of that duty?

We have found on the evidence that the Alexis Band did not understand the concept of taxing third parties, was not told that it had a taxing authority under the agreement between the Crown and Calgary Power, and, even if it had known, did not have the internal structures necessary to implement a taxing bylaw or the legal right to do so under the *Indian Act*. Given these circumstances, the First Nation claims that, having failed to negotiate a term for annual payments to the Band, the Crown ought to have provided the necessary assistance to the Alexis Band in later years to draft and implement its own taxation bylaw.

The First Nation argues, as we have already noted, that the exchange of departmental correspondence shortly before the final approval of the right of way illustrates that certain departmental officials considered the imposition of a tax as "the means of ameliorating deficiencies in the compensation and ensuring some sort of annual payment to the Band."[342] Canada's view, however, is that "this discussion about taxation was an attempt to find a proper value for rental price if it was the option chosen, because the Alexis Band did not have yet the power to tax in 1969."[343]

Although using property taxes as a means of satisfying the requirement of annual compensation was not departmental policy, it did provide a potential remedy in these circumstances. Yet, as the 1999 PHI report indicates, once the agreement between the Crown and Calgary Power was finalized on October 9, 1969, one week after Order in Council approval of the easement, there was "no evidence that the issue of taxation by the Alexis Band of the CPL [Canada Power Ltd] easement was raised with either the Band or the company...."[344]

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[341] Allan Fenton, Assessor, Fenton Associates Consulting Inc., to Jerome Slavik, Ackroyd, Piasta, Roth & Day, September 6, 2000 (ICC Transcript, Exhibit 14, p. 11).

[342] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 28.

[343] Submission on Behalf of the Government of Canada, July 16, 2002, p. 17.

The oral testimony from elder Phillip Cardinal suggests that DIAND told the Band to "get a bylaw in place"[345] in the late 1970s and 1980s. Chief Alexis, however, could not recall Indian Affairs ever initiating a process to pass a taxation bylaw, because to do so would have cost money: "We need lawyers, we need advisors, we need consultants, and we don't have those kind of resources."[346] Although the testimony suggests that DIAND may have advised the Band that it could initiate a tax scheme as early as the late 1970s, the reality is that this community did not have the necessary resources to understand taxation, to draft a bylaw, or to overcome the *Indian Act* prohibition on certain bands exercising their taxation powers. The record indicates that the Band did not impose taxes on Calgary Power or its successor TransAlta Utilities until the latter half of the1990s, when, as a result of legal advice and assistance from a lawyer in private practice, the Band passed its first taxation bylaw. TransAlta Utilities commenced paying taxes to the Alexis First Nation in 1997 in respect of the 1969 transmission line, and possibly the 1959 and 1967 distribution lines,[347] but has refused to consider retroactive payments.

Canada argues that no case law supports the proposition that the Crown has a fiduciary obligation to advise or assist a band council on exercising its taxation power.[348] Canada relies on the argument that the only fiduciary duty owed by the Crown in relation to taxation is the duty of minimal impairment. As we discussed earlier, however, the duty of minimal impairment, as set out in the *Osoyoos* case, is a duty to preserve the Indians' interest in the land to the extent possible by employing the least intrusive legal instruments. In this respect, the Crown met its obligations.

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[344] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 24 (ICC Exhibit 6, p. 28).

[345] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 69, Phillip Cardinal).

[346] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 55, Chief Francis Alexis).

[347] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 77–81, Howard Mustus and Chief Francis Alexis).

[348] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.

As we also stated, however, the duty of minimal impairment does not preclude or oust the possibility that other fiduciary duties may arise in certain circumstances. There may be a lack of legal precedents to support the argument that a positive duty arose to assist the Band in the years following 1969 to draft and implement a taxing bylaw; nevertheless, both Gonthier J and McLachlin J in *Apsassin* concluded that the fiduciary duty is a continuing duty that does not end at the date on which the land is alienated.[349] In *Apsassin*, the Crown had an ongoing duty to revoke an erroneous grant of land using authority granted to it by section 64 of the 1927 *Indian Act*.[350]

Having recognized the unfairness of providing only lump sum payments for transmission line right of way agreements prior to finalizing the Alexis deal, the Crown had the ongoing duty and the ability to correct the problem and recoup some of the losses to the Band over time. In our view, the section 82 prohibition, a matter totally within the Crown's discretion, cannot be used as a defence for inaction when the Crown had both an ongoing fiduciary duty to correct an inadequate agreement that it had made on behalf of the Band and the ability to right a wrong. As counsel for the First Nation put it:

> [The Crown] can't come back and re-negotiate after they have closed the deal. Taxation is a somewhat different situation. They could have stepped in at any point in time and addressed that issue and at least tried to mitigate some of the damages that were being experienced by the Band.[351]

Canada's counsel, however, argues that there is no link between obtaining adequate compensation and implementing a tax scheme:

> The question of adequacy of compensation under Section 35 that applies [is], "What is the interest in land that is required to satisfy the public purpose or the value of the land ... being taken." And once that is determined the question is: What is that interest worth? And then you secure payment of that interest. The question of a

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[349] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193 at 204–5 and 232–33, [1995] 4 SCR 344 at 365–66 and 404–6.

[350] *Indian Act*, RSC 1927, c. 98, s. 64.

[351] ICC Transcript, August 20, 2002, p. 46 (Trina Kondro).

> taxing by-law on the other hand, is related to how [a] First Nation wishes to govern its land.[352]

In contrast to agreements for compensation, says Canada's counsel, First Nations are given the power to implement a wide variety of bylaws in their discretion, subject to section 82. As such, why, asks counsel, would the law impose a positive duty on Canada to enact such bylaws?

We agree that, given the wording of the taxation clause, its primary purpose appears to be to compensate the First Nation for Calgary Power's continued use of the land over time, as well as to raise money for related administrative costs to the First Nation. As such, taxation revenues are not to be confused with annual payments as part of an agreement to expropriate. We also agree in principle that the Crown does not have a duty, in the words of Canada's counsel, to "start implementing all kinds of bylaws for First Nations."[353] On the particular facts of this claim, however, assisting the Alexis Band to adopt and implement a taxing bylaw, including helping it build capacity, would have provided some recompense to the Band for the failure to obtain a renewable agreement for annual payments. We conclude, therefore, that the Crown breached a continuing fiduciary duty to assist the Band to obtain tax revenues in the years following the 1969 agreement.

Issue 2(f) Duty to Obtain Informed Consent

Was there a fiduciary duty to obtain the Band's informed consent to the 1969 transaction? If so, was that duty breached?

According to section 35 of the *Indian Act* and the provisions of the Alberta *The Water, Gas, Electric and Telephone Companies Act*, there was no statutory requirement on the part of the Crown or the expropriating authority to obtain the consent of the Band to the 1969 transaction. Nevertheless, DIAND had a practice of seeking a band's consent before requesting Governor in Council approval of an agreement between the Crown and the expropriating authority. Further, although we have found that DIAND officials were likely not involved in the discussions resulting in the Band Council Resolution, they ultimately relied on the resolution as evidence of the Band's true intent.

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[352] ICC Transcript, August 20, 2002, pp. 105–6 (Kevin McNeil).

[353] ICC Transcript, August 20, 2002, p. 106 (Kevin McNeil).

No doubt, the Band Council members believed that their consent was required. After all, Calgary Power had sought their consent on two previous occasions in order to gain access to the reserve through rights of way to bring electricity to the school and houses.

Neither the written record nor the community evidence indicates whether the Band Council discussed the rationale for providing its consent to the right of way. Phillip Cardinal testified that he remembered that time period and talk by Mr Johnson and Mr Sim about Calgary Power's willingness to pay the Band some money for running its line through the reserve. Mr Cardinal also recalled that only one Councillor, J.B. Mustus, opposed the transmission line:

> we were told that they were going to move power from Wabamun to Wabasca, and that power line – they needed that power line to go across the Reserve, I guess, to make it as close as possible, I suppose. And that's when he [J.B. Mustus] didn't think that would be good for the Band. The rest of the Council didn't, and he was just in opposition to having that line go across the Reserve.
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> ...
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> I don't think they were in opposition because of the – because of no employment on the Reserve and stuff like that. They wanted to get whatever they can for the membership, I suppose.[354]

When asked whether there was a discussion in the community about the 1969 transmission line, Mr Cardinal replied:

> there was never any kind of dialogue, I guess, between the representatives from Trans-Alta – not Trans-Alta but Calgary Power at that time, between those people and the membership of the Alexis Band or the leadership. There was none. There were no posters or nothing like that or no kind of information.[355]

Although the community evidence is inconclusive, it does suggest that the Band Council had an honest belief that it was being asked to give consent to the right of way permit.

We find that, although the Crown had no statutory duty to obtain the consent of the Band to an expropriation, the Crown's fiduciary duty in this claim included the duty to obtain consent because, in good faith, it had established this practice in its dealings with bands and corporations. To deny the existence of a fiduciary duty in these circumstances would call into question the honour of the Crown in dealings with First Nations.

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[354] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 86–87, Phillip Cardinal).

[355] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 87–88, Phillip Cardinal).

It goes without saying that consent must be informed to be a valid consent. Hence, the question is whether the Crown satisfied its duty to obtain the Band's knowledgeable and informed consent to the 1969 transaction.

The First Nation refers to a number of important pieces of information that were not communicated to the Band either before or after the BCR was passed.[356] First, counsel for the First Nation points out that the BCR was not accompanied by a map, survey, or any indication of the location of the proposed line other than a reference to the section numbers.

Second, says counsel, there is no evidence in the resolution that the Band Council understood that, unlike the distribution lines, the 1969 line would be granted pursuant to a section 35 expropriation:

> The Council had a right to know what the Crown was giving away. There is no evidence that the Crown made any effort to properly advise the Council or to seek their informed consent.[357]

Third, counsel for the First Nation argues that the resolution stipulated compensation for land that is 100 feet wide, whereas the amount of land to be cleared for the purpose of the line was 150 feet in width. Young's letter of April 24, 1968, to Turner had also raised the apparent discrepancy in the figures contained in the BCR, in that it showed that the Indians were to be compensated for only 41 acres whereas the clearing totalled 61 acres.[358] He complained that no explanation was given, and it would appear from the record that the discrepancy was never adequately explained. Turner's response merely stated that the "Indians were paid to clear big trees outside the right-of-way where there was a danger of them falling on the line."[359] Counsel for the First Nation uses this discrepancy as part of their argument that compensation was inadequate. It is also illustrative, in our view, of the inability of the Band Council to assess whether the offer was fair, given the fact that the amount of land affected by the right of way would be 50 per cent greater than the acreage to be compensated.

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[356] ICC Transcript, August 20, 2002, pp. 29–31 (Trina Kondro).

[357] Submission on Behalf of Alexis First Nation, May 24, 2002, p. 49.

[358] R.G. Young, Chief, Resources and Industrial Division, DIAND, to [J.H. MacAdam], Deputy Administrator of Lands, DIAND, April 24, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 285).

Fourth, counsel for the First Nation points out that 15 months passed between the date of the BCR on March 4, 1968, and final Order in Council approval of the 1969 line on October 1, 1969. During this time, says counsel, the Crown could have advised the Band Council to seek better terms in the form of annual rents and renewal provisions, given that the resolution was passed just prior to an "extensive debate within the Department on the need for ensuring annual compensation or implementation of a tax. If there was consent, it was vitiated by the passage of time and the intervening discussions."[360]

Canada does not address the first three examples of information the First Nation contends should have been available to the Band and instead focuses on the particulars of the fourth item, knowledge that the Band could have or should have demanded annual rents and a renewal provision. Canada argues in its oral submission that a number of documents indicate that the Band knew of the options open to it.

First, says counsel for Canada, a memo from Turner to Ragan dated December 16, 1968, shows that the Band Council was being kept in the loop. The memo states that regional officials "have now had a chance to discuss the right of way application with the Band Council, Calgary Power, and Oil Company officials," that the agreement is satisfactory to all concerned, but that they have "been unable to get the Alexis Band Council to say definitely what they feel should be written into a contract such as this." The memo goes on to say that the Band Council "had indicated that the agreement should be renewed from time to time, and if the annual rental is agreed upon, it can be adequate to cover the tax assessment and make a one 'package deal.'" Finally, Turner asks for an agreement to be prepared to discuss with the Band Council and Calgary Power "clause by clause."[361] This memo, argues counsel, shows "clearly there was discussions [sic] occurring with the Alexis Band Council on a renewable type agreement...."[362]

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[359] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, DIAND, June 14, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 286).

[360] Reply Submission on Behalf of Alexis First Nation, July 31, 2002, p. 17.

Second, says Canada, Ragan's follow-up memo to MacAdam, Administrator of Lands at DIAND headquarters, on January 2, 1969, comments that Turner's request to have an agreement prepared for discussion with the Band may present a problem to MacAdam "in view of the indecision on the part of Band Council who indicated their desire for a lump sum settlement by Band Council Resolution...."[363] Third, in a further memo to Ragan dated April 9, 1969, MacAdam points out that "[i]t is my responsibility that maximum Revenue be obtained for the Band" and goes on to state his belief that Calgary Power would be adverse to having to pay an annual tax to the Band Council in addition to an agreed-upon sum.[364] Finally, Canada refers to a July 9, 1969, memo from M.G. Jutras, Assistant Regional Director for Alberta, to MacAdam in which Jutras recommends a lump sum payment only, as it is "in accordance with the Band Council's wishes and further substantiated by our previous covering memo on the subject."[365]

All of the evidence, argues Canada's counsel, shows that, over the 15 months between the BCR and final approval for the right of way,

> we see quite a debate occurred, and ultimately, a decision was made and ... it was in accordance with what the Band [wanted] to do at the time.[366]

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[361] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

[362] ICC Transcript, August 20, 2002, p. 98 (Kevin McNeil).

[363] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

[364] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, April 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 321–22).

[365] M.G. Jutras, Assistant Regional Director – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, July 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 348).

[366] ICC Transcript, August 20, 2002, p. 102 (Kevin McNeil).

When asked by Commission counsel what evidence, other than the July 9, 1969, memo, Canada relies on to show that the Band Council finally chose the option of a lump sum payment notwithstanding evidence of its earlier indecision, counsel for Canada replied that, even though reports of the Band Council meetings and discussions do not exist, the evidence as a whole leads to an inference that, when the final recommendation was made, DIAND believed that a lump sum payment was the best and was in accordance with the Band's wishes.[367]

After considering the evidence and arguments presented, we agree with the First Nation that the Band Council lacked important information when it passed the BCR – namely, the location of the transmission line and what legal instrument would be used to take the right of way. We also agree that the BCR includes an apparent discrepancy between the amount of land for which compensation was offered and the total acreage that would be required to maintain the right of way. Nevertheless, we concluded that DIAND officials had likely not been involved in the initial discussions with Calgary Power leading to the BCR. Once the plan of survey was prepared, however, DIAND officials did meet with the Band Council to discuss and obtain approval of the plan of survey.

In addition, it is our view that the Band Council's lack of understanding of the legal instrument used to grant the easement to Calgary Power would not have made a material difference to the Band Council's consent as it appeared to understand in general terms the purpose of the grant. Authority for this approach is found in *Apsassin.*[368]

With respect to the apparent discrepancy between the acreage to be compensated and the greater width of land to be cleared for the right of way, this knowledge may well have affected the Band's understanding of the adequacy of the compensation and could have been addressed by the Crown in the intervening 15 months. There is nothing in the record to suggest that the Band Council was aware of the possibility of negotiating some compensation for the additional 50 per cent of the land that was taken. On this point, we agree that the Band Council did not have necessary information to provide its informed consent.

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[367] ICC Transcript, August 20, 2002, pp. 112–14 (Kevin McNeil).

[368] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193 at 199–200; [1995] 4 SCR 344 at 358–59.

Where we have greatest difficulty, however, is in concluding, as Canada does, that the Band had adequate knowledge of the possibility of obtaining annual payments and a review period. The record does not indicate how the Band learned of the possibility of striking a deal based on annual charges. It may have been DIAND officials who broached the subject or the information could have come from another source. But the Crown's own evidence is clear that the Band was indecisive. As we have found, the statement in the July 9, 1969, memo[369] that the department's final recommendation was in accordance with the Band Council's wishes was more likely a reference to the terms of the BCR than the product of follow-up discussions between the Band and DIAND officials. In recommending approval of the agreement, the Crown's agents relied on the BCR as the expression of the Band Council's consent.

We find that DIAND, to its credit, created a fiduciary duty to obtain consent from the Band Council before proceeding to approve the 1969 transmission line but that, having done so, it had a responsibility to ensure that the Band had sufficient knowledge to give informed consent. The Crown, however, failed to address with the Band at least two important items, the discrepancy between the acreage to be compensated and the acreage required by Calgary Power, and the possibility and advantages of requiring annual charges and a renewable agreement. As a result, the Crown breached its fiduciary duty to the Band.

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[369] M.G. Jutras, Assistant Regional Director – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, July 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 348).

PART V

CONCLUSIONS AND RECOMMENDATION

We have completed our review of the rejected specific claim of the Alexis First Nation. This claim concerns the federal Crown's grants of three rights of way to Calgary Power on or across Alexis IR 133 during the 1950s and 1960s. The First Nation asked this Commission to determine whether or not the Department of Indian Affairs and Northern Development breached its statutory and/or fiduciary obligations to the Alexis Band when the Crown granted the right of way permits to Calgary Power.

The Alexis First Nation in fact did not argue that the Crown breached its statutory obligations with respect to the 1959 and 1967 distribution lines. In addition, we did not consider the First Nation's allegations that the Crown breached its statutory obligations with respect to the permit for the 1969 transmission line, since the First Nation had raised the particular issue of absence of a valid public purpose as the source of the breach for the first time in its written submissions. Therefore our conclusions pertain only to fiduciary obligations.

After carefully reviewing the extensive documentary record in this claim, and after hearing the testimony of Alexis First Nation elders and the submissions of legal counsel, we have arrived at the conclusions that follow.

Issue 1 Did the Department of Indian Affairs breach its statutory and/or fiduciary obligations, if any, to the Alexis Band in the manner in which the Department granted a section 28(2) permit and a section 35 right of way to Calgary Power to construct power utility lines in 1959, 1967, and 1969?

(a) The Crown did not breach its fiduciary duty to obtain fair and reasonable compensation for the 1959 and 1967 distribution lines.

(b) Based on our finding that the Band was vulnerable in its negotiations with Calgary Power, the Crown breached its fiduciary duty both to advise the Band of the relative strength of its bargaining position in the negotiations for the 1969 transmission line and to keep the Band informed.

(c) There was no fiduciary duty in these circumstances to obtain an independent appraisal of the fair market value of the land to be expropriated for the 1969 line.

Issue 2 Did the Department of Indian Affairs breach its statutory and/or fiduciary obligation to the Band by failing to obtain a reasonable annual fee, rental, or charge as permitted in agreements between DIAND and Calgary Power?

(a) The Crown had a fiduciary duty to prevent an exploitative agreement in 1969; this duty was breached when it approved a transaction for a lump sum payment rather than annual compensation to be renegotiated at periodic intervals, or a combination of both.

(b) The Crown breached its fiduciary duty to obtain an independent assessment of the taxes being paid by Calgary Power to adjacent jurisdictions for the right of way for the same 1969 transmission line.

(c) The Crown breached its fiduciary duty to obtain annual revenues by means of taxes on Calgary Power.

(d) The Crown met its fiduciary duty to minimally impair the Band's interest in the reserve lands granted to Calgary Power.

(e) The Crown had a continuing fiduciary duty, which it breached, to assist the Band to draft and implement appropriate taxation bylaws in the years following approval of the permit for the 1969 line.

(f) The Crown breached its fiduciary duty to obtain the Band's informed consent to the 1969 line, especially since the Crown ultimately relied on the Band's wishes as expressed in its Band Council Resolution.

A number of the fiduciary duties arose in the claim over the 1969 transmission line because of the particular circumstances of this Band, notably its vulnerability in negotiations with the power company, and the convergence of the timing of the permit approval with the advent of a new DIAND policy on easements for major transmission lines. Of critical importance in this claim was the knowledge within the department of the inadequacy of permitting rights of way that were in reality perpetual in exchange for a one-time payment to the band. Once the Crown permitted the Alexis transaction to proceed under the outdated policy, not only was the deal improvident and exploitative, but it gave rise to other fiduciary duties, such as the obligation to ensure that the Band's taxing authority could be exercised, if necessary by the Crown on behalf of the Band, as a means of recouping the losses resulting from the agreement.

Several officials within the Department of Indian Affairs acted conscientiously in trying to persuade their colleagues to improve the terms of the transaction between the Band and Calgary Power. The department also acted responsibly in minimally impairing the Band's interests by providing for its taxing authority in the future. Nevertheless, the final recommendation to approve the permit was based primarily on the views of one Regional Director when the majority of the concerned DIAND officials at headquarters and in the regions knew that this type of arrangement was unfair to bands.

Although we have not concluded that the Crown breached any statutory duties to the Alexis First Nation in respect of any of the three lines or any fiduciary duties in respect of the 1959 and 1967 lines, the Crown did breach a number of fiduciary duties at the time of and subsequent to the grant of the 1969 right of way. Of these the most important, in our view, was the duty to make efforts to obtain in the agreement a provision for annual payments to the Band, or, failing that, to assist the Band to implement its taxation authority, if necessary collecting the revenues on the Band's behalf.

We therefore recommend to the parties:

> **That the Alexis First Nation's claim be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde Commissioner	Roger J. Augustine Commissioner	Sheila G. Purdy Commissioner

Dated this 13th day of March, 2003.

APPENDIX A

INDIAN CLAIMS COMMISSION

Interim Ruling: Alexis First Nation Inquiry
TransAlta Utilities Rights of Way Claim

Ruling on Government of Canada Objections

PANEL
Commission Co-Chair Daniel J. Bellegarde
Commissioner Elijah Harper
Commissioner Sheila G. Purdy

COUNSEL
For the Alexis First Nation
Jerome N. Slavik

For the Government of Canada
Robert Winogron

To the Indian Claims Commission
David E. Osborn, QC / Kathleen N. Lickers

April 27, 2000

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BACKGROUND

This preliminary ruling is in relation to a specific claim filed in October 1995 by the Alexis First Nation (Alexis), in which it is alleged that Canada owes a lawful obligation to the First Nation in respect of three easements over reserve land. Commencing in 1959, these easements were granted to Calgary Power (now Transalta Utilities) to build transmission lines. The Indian Claims Commission (ICC) is ruling on an objection by Canada to the ICC's jurisdiction to accept this claim for an inquiry on the basis that it is not a "rejected" claim.

Since Alexis filed its specific claim, the First Nation's counsel, Jerome Slavik, has requested on several occasions that the ICC accept the claim for review on the basis that it has, in fact, been rejected by Canada. The First Nation alleges that repeated delays in the process of considering the claim within the Department of Indian and Northern Affairs (DIAND) and the Department of Justice constitute a rejection of the claim.[1]

Mr Slavik first requested that the ICC accept the claim for review in a letter dated August 21, 1997, after receiving information that there would be a further "delay of an undetermined amount of time" within the Department of Justice in preparing its legal opinion. Further written requests to the ICC were made on November 4, 1998, February 5, 1999, July 16, 1999, and October 18, 1999. After having received documentation from Alexis, Canada's written objection to the ICC's jurisdiction to review this claim, and further correspondence from both parties, the Commissioners accepted the First Nation's request for an inquiry on October 21, 1999. It is this decision that Canada now objects to as being premature, on the basis that the claim has not been expressly rejected by Canada.

Canada did not make formal submissions to the ICC in support of its challenge to the jurisdiction of the Commission to inquire into the Alexis claim. It did, however, set out its position in a letter dated February 7, 2000, from Robert Winogron, Counsel, DIAND Legal Services, to Kathleen Lickers, Senior Legal Counsel, ICC. Both this and the letter of March 1, 1999, from Richard Wex, Senior Counsel, Department of Justice, to David Osborn, Commission Counsel, ICC, represent Canada's submissions.

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[1] It is the Commission's understanding that once a claim is submitted to Specific Claims, it is reviewed by DIAND which prepares a "draft historical report" for comment by the First Nation. Once acceptable to the First Nation, the historical report and claim submission are forwarded to the Department of Justice for an opinion. Once DOJ has rendered its opinion, the claim is considered by the Claims Advisory Committee.

Counsel for Alexis, Mr Slavik, responded in writing to Canada's February 7, 2000, letter on February 14, 2000, to which he attached his letter of April 22, 1999, to Mr Wex and his letter of January 6, 1998, to Anne Marie Robinson, Director of Policy, DIAND. The panel considered these three letters as representing Mr Slavik's submissions.

The Commission prepared, by mutual agreement of the parties, a document brief of all relevant correspondence and previous mandate rulings of the Commission. The parties accepted this brief without supplementing it with legal argument.

THE FACTS

The panel has reviewed all the material submitted to it in the document brief prepared by the Commission. The following represents the most important facts in the chronology of this claim:

1995

1. On October 4, 1995, the Alexis First Nation commenced a claim pursuant to the Specific Claims Policy of DIAND. The claim alleges that Alexis did not receive any rent, taxes, or other benefit from a transmission line constructed on the reserve pursuant to easements granted to Calgary Power (now TransAlta Utilities) beginning in 1959.

1996

2. On April 23, 1996, Mr Slavik wrote a letter to Al Gross, Federal Negotiator, Specific Claims West, DIAND, in which he cited the Supreme Court of Canada's decision in the *Apsassin* case (*Blueberry River Indian Band*[2]) to support the First Nation's claim that DIAND breached its fiduciary obligation to the First Nation by failing to obtain a reasonable fee, rental, or charge from the utility for the easement.

3. Shortly thereafter, Specific Claims West completed its preliminary historical report, forwarded it to Alexis, and received a response from Mr Slavik on August 11, 1996. He repeated an earlier request that the claim be fast-tracked through the process.

4. By letter dated October 15, 1996, to Michel Roy, Director General, Specific Claims Branch, DIAND, Mr Slavik summarized his client's view that the Specific Claims historical report was inaccurate and misleading, and asked DIAND to reconsider an earlier decision not to fund Alexis and to review and respond to the report. On December 9, 1996, the funding request was turned down by the Research Funding Division of DIAND. The same letter

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[2] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

indicated that the claim had been submitted to the Department of Justice on October 17, 1996, for review.

5. On December 13, 1996, Pamela Keating, Research Manager, Specific Claims Branch, DIAND, wrote to Mr Slavik indicating that DIAND "expects to receive a preliminary legal opinion from the Department of Justice by the end of April, 1997," after which the government would need some time to determine its preliminary position on the claim.

1997

6. In response to a further enquiry by Mr Slavik, Mr Roy reported to the First Nation on June 18, 1997, that the department now anticipated "receiving the draft preliminary legal opinion toward the end of June 1997."

7. On August 21, 1997, Mr Slavik wrote to the Indian Claims Commission indicating that, based on information obtained from DIAND, there would be a "delay of an undetermined amount of time" in processing the Alexis claim. He requested that the ICC "deem the Department of Indian Affairs to have rejected our client's claim" and to proceed with a planning conference.

8. On September 19, 1997, Ms Keating again wrote to Mr Slavik, indicating that "it could take another two to three months before we are able to provide you and your clients with Canada's preliminary position on the claim."

9. On December 23, 1997, rather than providing Canada's preliminary position on the claim, the Department of Justice recommended that additional research be conducted. According to Canada, the First Nation agreed to the research, and DIAND contracted with Public History Inc. to undertake and complete the research by June 15, 1998.

1998

10. On January 6, 1998. Mr Slavik wrote to Ms Robinson. In addition to requesting the status of the claim in the validation process and that it be fast-tracked, he informed DIAND that he would be commencing litigation on this file on behalf of his client. Of particular note is the following statement: *"If at any point the claim is validated during the specific claims process, we will of course, suspend the litigation."* (Emphasis added.)

11. On June 10, 1998, six months later, Alexis filed its Statement of Claim in the Federal Court of Canada, Trial Division.

12. On November 4, 1998, Mr Slavik again requested in writing that the ICC undertake an inquiry into his client's claim.

1999

13. On February 5, 1999, Mr Slavik provided the ICC with documentation regarding the Alexis claim and repeated his request that the ICC accept the claim for inquiry.

14. On March 1, 1999, Mr Wex advised the ICC in writing that,

> Canada was actively addressing this claim when the First Nation chose to pursue its claim before the courts, at which time Canada stopped treating the matter as a specific claim under the Specific Claims Policy.
>
> This decision was entirely consistent with DIAND's "litigate or negotiate" policy. For resource and other reasons, Canada will not simultaneously address claims under one of its claims resolution policies, when a First Nation *actively pursues its claim in the courts*. [Emphasis added.]

15. In the same letter, Mr Wex advised the ICC that the research project had been nearing completion when Canada was informed in July 1998 that the First Nation had commenced litigation. The letter also indicated that there were subsequent discussions between Canada and Mr Slavik and that Mr Slavik had agreed to place the litigation in abeyance so that Canada could complete its research.

16. The litigation was placed in abeyance by order of the Federal Court on March 10, 1999.

17. On June 14, 1999, Mr Wex wrote to Mr Slavik and to Mr Osborn, indicating that the Specific Claims Branch had resumed work on the claim and expected to be able to provide the research report and documents to Alexis by the end of June 1999.

18. By mid-July, Alexis had not received the research report. Mr Slavik wrote to the ICC on July 16, 1999, requesting that the ICC now deem that the claim has been rejected by Canada and proceed with an inquiry.

19. Cindy Calvert, Senior Analyst, Prairie Claims, Specific Claims Branch, DIAND, wrote to the ICC on July 30, 1999, explaining that, "due to resourcing constraints," the review of the material had not been completed but that it was hoped that the First Nation would receive it "in the next month or so."

20. On October 18, 1999, Mr Slavik reported to the ICC that he had been informed by Ms Calvert that the claim was still in research but that she gave no time frame for its completion. Again, the ICC was asked to intervene.

21. On October 27, 1999, the Commissioners reviewed and accepted the First Nation's request for an inquiry.

22. On November 19, 1999, Ms Calvert informed Mr Slavik that the draft research report and supporting documentation would be sent to Alexis by December 3, 1999, and that further revisions would follow within the next two months.

2000

23. By letter to the ICC dated January 4, 2000, Paul Girard, Director General, Specific Claims Branch, DIAND, indicated that Alexis had received the research report, and that following the First Nation's review, the materials would be sent to the Department of Justice for a further review, after which Canada would be in a position to provide the First Nation with its preliminary position on the claim.

24. By letter dated February 7, 2000, from Mr Winogron to the ICC, Canada challenged the jurisdiction of the ICC to inquire into the Alexis claim, on the basis that the claim had not yet been rejected by Canada.

THE ISSUES

1 Do the words "already rejected by the Minister" include circumstances in which Canada's conduct is tantamount to a rejection?

If the answer to Issue 1 is yes, Issue 2 must be considered.

2 On the facts of the Alexis First Nation's claim, was Canada's conduct tantamount to a rejection, thereby giving the Commission the authority to review the claim?

RULING

ISSUE 1

Do the words "already rejected by the Minister" include circumstances in which Canada's conduct is tantamount to a rejection?

Canada argues in its letter of February 7, 2000, that the ICC lacks jurisdiction to proceed with an inquiry because the claim has not yet been rejected by the Minister. Canada points to the "empowering legislation" that enables the Commission to inquire into and report on only those claims that have been rejected by the Minister.

Counsel for Alexis argues that a rejection is not confined to a formal dismissal of the claim but can also be the outcome of the Crown's conduct, a sequence of events, or other circumstances.

In support of the contention that the ICC has the jurisdiction to determine that a claim has been rejected where there is no express communication to that effect, Mr Slavik asks the panel to refer to previous decisions of the ICC dealing with its jurisdiction to review such claims.

The mandate of the Commission is contained in Order in Council PC 1992-1730, July 27, 1992, which states, among other things, that the Commissioners shall:

> inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy *where that claim has already been rejected by the Minister*;
> [Emphasis added.]

The panel also reviewed four rulings by the ICC in which its jurisdiction to accept a claim had been challenged by Canada. For ease of reference, these rulings are attached as Appendices:

A. *Interim Ruling: Athabaska Denesuline Treaty Harvesting Rights Inquiry: Ruling on Government of Canada Objections*, May 7, 1993, in [1994] 1 ICCP 159.[3]

B. "La Ronge Candle Lake and School Lands Claims", May 9, 1995, by letter from Robert F. Reid, Legal and Mediation Advisor; ICC file 2107-04-01,02,03.[4]

C. "Mikisew Cree First Nation [Treaty Entitlement to Economic Benefits]", in *Inquiry into the Claim of the Mikisew Cree First Nation*, (1998) 6 ICCP 183 at 209.[5]

D. "Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim: Ruling on Mandate Challenge," by letter dated June 28, 1999, from Commissioners Bellegarde, Augustine, and Harper, ICC file 2106-10-01.[6]

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[3] To be reported in (2003), 16 ICCP.

[4] See "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," to be reported in (2003), 16 ICCP.

[5] See "Interim Ruling: Mikisew Cree Nation Inquiry, Treaty Entitlement to Economic Benefits Claim," to be reported in (2003), 16 ICCP.

[6] See "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," to be reported in (2003), 16 ICCP.

The Athabaska Denesuline ruling concerned the question of whether a claim that had not gone through the specific claims process could nevertheless be a "rejected" claim. Canada argued that the Order in Council creating the Indian Claims Commission prevented it from inquiring into a claim unless it had been expressly rejected by the Minister. The panel found, however, that there was "nothing in those terms of reference that confines the Commission to claims rejected in a particular way."[7] In this case, the panel determined that a refusal by the funding arm of DIAND to fund the Athabaska Denesuline effectively prevented the First Nation from going through the specific claims process in the first place, thereby constituting a rejection of its claim.

The La Ronge mandate challenge also dealt with the interpretation of the words "rejected by the Minister." The First Nation's Candle Lake and School Lands claims, together with a treaty land entitlement (TLE) claim, originally proceeded by way of litigation rather than through the specific claims process. Six years after the litigation began, a senior official at DIAND wrote to the Lac La Ronge Band in respect of negotiations on the TLE litigation, adding that "the Department of Indian Affairs is convinced that the lands at Candle Lake and the 'school lands' never became reserves and that a court would concur."[8] Canada argued before the ICC that this letter did not constitute a rejection of the Candle Lake and School Lands claims because a rejection must be in relation to a claim submitted under the Specific Claims Policy. The First Nation argued that it had already given Canada all the relevant information and argument supporting the claims within the litigation, and that the letter amounted in form if not in substance to a rejection of these claims. The panel agreed with the First Nation and also observed that Canada had raised no objection to the Commission's inquiring into the TLE claim, notwithstanding that it too had never been formally put through the specific claims process.

In Mikisew Cree First Nation, a ruling dealing with an allegation of unreasonable delay, Canada challenged the mandate of the Commission to accept the claim for review before Canada had expressly rejected it. Canada argued that there must be a rejection of the claim on its merits before the Commission can proceed with an inquiry and that, notwithstanding a preliminary review that did not disclose an outstanding lawful obligation by Canada to the Mikisew Cree, no final decision had been made.

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[7] ICC, *Interim Ruling: Athabaska Denesuline Treaty Harvesting Rights Inquiry: Ruling on Government of Canada Objection* (Ottawa, May 7, 1994), reported [1994] 1 ICCP 159 at 163, to be reported in (2003), 16 ICCP.

[8] Quoted in "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," to be reported in (2003), 16 ICCP.

The First Nation argued that the Commission, as an administrative body, has the requisite authority to make decisions with respect to its jurisdiction, subject to judicial review of such decisions. As such, the First Nation argued, it falls to the Commission to determine in each case what constitutes a “rejection.” A rejection, according to the First Nation, may be expressed in writing or orally or may be “based on the action, inaction, or other conduct, such as the refusal or inability to make a decision of the Crown within a reasonable period of time ...”[9] The panel found on the facts that the delay by Canada in deciding whether to accept the claim was tantamount to a rejection and that the panel therefore had the authority to proceed with an inquiry.

Finally, the Sandy Bay First Nation ruling dealt with the question of the Commission’s jurisdiction to hear a claim that, in Canada’s view, was a significant departure from the original claim and had not been processed through the specific claims process or rejected. Although Sandy Bay and the Alexis claims differ on the grounds for alleging that Canada has rejected the claim, we note with approval the reference to the discussion of the Commission’s mandate in *Lax Kw’alaams Indian Band Inquiry*.[10] The panel there noted that in past rulings the Commission has tended to view its mandate in a very broad manner, that the “mandate is remedial in nature and that [the Commission] has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada’s Specific Claims Policy.”[11]

In each of these four ICC rulings a First Nation has asked the ICC to review a claim that has not been expressly rejected as contemplated by the process set out in Canada’s Specific Claims

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[9] ICC, “Interim Ruling: Mikisew Cree First Nation Inquiry, Treaty Entitlement to Economic Benefits Claim,” reported (1998) 6 ICCP 183 at 213; to be reported in (2003), 16 ICCP.

[10] ICC, *Inquiry into the Claim of the Lax Kw’alaams Indian Band* (Ottawa, June 29, 1994), reported [1995] 3 ICCP 99 at 158, quoted in “Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim,” to be reported in (2003), 16 ICCP.

[11] ICC, *Inquiry into the Claim of the Lax Kw’alaams Indian Band* (Ottawa, June 29, 1994), reported [1995] 3 ICCP 99 at 158, quoted in “Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim,” to be reported in (2003), 16 ICCP.

Policy as published in 1982 in *Outstanding Business.*[12] In all four cases the Commission concurred with the First Nations' arguments that the Commission had the jurisdiction to review the claim because there had been, as a result of Canada's conduct or other circumstances, a rejection.

We agree with the Athabaska Denesuline ruling that the Order in Council establishing the Commission's mandate does not set out how a claim is "rejected." Further, we agree with the argument expressed by counsel for Mikisew Cree that a "rejection" should not be confined to an express communication, either written or verbal, but can be the result of certain action, inaction, or other conduct. To restrict the mandate of the Commission to a narrow and literal reading of the Specific Claims Policy would prevent First Nations in certain circumstances from having their claims dealt with fairly and efficiently.

Finally, we are mindful of previous rulings, in particular Sandy Bay First Nation,[13] in which Commissioners have confirmed their interpretation of their mandate as being remedial in nature. In our view, it is incumbent on all participants in the specific claims process to ensure that Canada's final resolution is arrived at without subjecting the First Nation to a myriad of delays. We remain cognizant of the fact that this process was designed to speed up the resolution of specific claims and to provide the parties with an alternative to expensive and protracted litigation. As such, the process is required to meet the test of expediency and cost savings. It could not have been the intent of Parliament when it designed the mandate of the Commission to prevent a First Nation from utilizing the ICC in circumstances where Canada has not made a decision on acceptance or rejection within a reasonable time. The ability to intervene in these circumstances is wholly consistent with the remedial nature of the Commission's mandate.

The panel confirms the Commission's findings in previous rulings that it has the mandate to make decisions regarding its jurisdiction to review claims. Further, the panel concludes that a claim may be rejected by Canada in more than one way: by an express communication to the First Nation;

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[12] See DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 23 ff.

[13] ICC, *Inquiry into the Claim of the Lax Kw'alaams Indian Band* (Ottawa, June 29, 1994), reported [1995] 3 ICCP 99 at 158, quoted in "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," to be reported in (2003), 16 ICCP.

by the action, inaction, or other conduct of Canada; or in other circumstances where it is unnecessary and would be unfair to compel the First Nation to fit its claim into the strict confines of the Specific Claims Policy.

Issue 2

On the facts of the Alexis First Nation's claim, was Canada's conduct tantamount to a rejection, thereby giving the Commission the authority to review the claim?

Where there has been no formal communication of a rejection of the claim, as in this case, it remains to consider whether the action, lack of action, or other conduct of the Crown is sufficient to conclude that the claim has been rejected. Whether the Commission is correct in accepting a request for an inquiry in these circumstances will depend on the facts of each case.

From October 1995, when the Alexis claim was filed with DIAND, until the end of 1996, this claim appeared to be progressing relatively smoothly. The preliminary historical report prepared by Specific Claims West was completed in April 1996 and reviewed by the First Nation by August of that year. Where the process began to break down, however, was in the referral of the claim to the Department of Justice in October 1996 for a preliminary legal opinion. Counsel for Alexis was informed that it would take first four and then six months to complete the legal analysis, after which DIAND would need an unspecified amount of time to formulate its preliminary position. By the end of 1997, the First Nation had still not received DIAND's preliminary position.

It should be added here that, in the early days of this claim, counsel for Alexis asked DIAND in writing on four separate occasions if this claim could be fast-tracked on the basis that it was straightforward and represented an amount less than $500,000. It is clear from the correspondence that Mr Slavik believed that there was in place a fast-track process for simple, less costly claims and that his client's transmission line claim fit this category. Yet, there is no evidence before the panel to indicate that DIAND responded to his repeated requests or even advised him whether such a fast-track process existed.

Instead of providing the government's preliminary position by the end of 1997, DIAND, on the recommendation of the Department of Justice, requested that further historical research be conducted. It is perhaps telling that Mr Slavik had complained about the first research report in mid-1996. The second report was to be completed by June 1998 and, according to DIAND's letter of March 1, 1999, to the ICC, the research was "nearing completion" in July 1998. The entire process, however, was then put on hold because the government learned that the Alexis First Nation had commenced litigation of its claim in the Federal Court.

The panel concludes that from October 1995 until July 1998, a period of close to three years, the First Nation was led to believe that a preliminary position would be forthcoming. Further, the panel finds that there is nothing in the materials filed by Canada that would suggest that this claim is unduly complicated or potentially costly, factors that could justify the significant delays up to that point. When Alexis agreed to further research at the end of 1997, it was with the understanding that it would be completed and shared with the First Nation by June 1998. This did not happen. The First Nation received neither the research report nor DIAND's long-awaited preliminary position, or any indication when it or a final position would be forthcoming. In the circumstances, we conclude that, even if the parties had agreed that the additional research was necessary, the delay by the Department of Justice in recommending that such research was required was unreasonable.

Unfortunately, instead of the process picking up speed in July 1998, it ground to an immediate halt when DIAND learned of the litigation. From then until June 1999, almost one year later, no work was done on the claim. This further delay deserves a closer look, as Canada submits that it was caused by the First Nation's actions.

On January 6, 1998, counsel for Alexis wrote to DIAND advising that the First Nation would be commencing litigation. The letter also stated: "If at any point the claim is validated during the specific claims process, we will of course, suspend the litigation." It is clear that the First Nation was under the belief that the litigation and the claims process could coexist without jeopardizing either one. In his letter to Mr Wex on April 22, 1999, Mr Slavik indicated that the litigation had been commenced to preserve his client's rights and that DIAND was informed shortly afterward that the First Nation "did not intend to proceed with this Statement of Claim in Court providing DIAND expeditiously proceeded with the claims."

It is uncertain when Mr Slavik became aware that all work had stopped on his client's claim; it is clear from the record, however, that DIAND did not respond in writing to Mr Slavik's January 6, 1998, letter to advise him of DIAND's policy, which was to stop treating a matter as a specific claim once litigation started. Given that this policy is not contained in *Outstanding Business* or publicized widely, if at all, it was incumbent on DIAND to advise the First Nation in writing that it was suspending all work on its claim. The panel has no evidence before it that Canada made any efforts either to ensure that the First Nation was aware of the consequences of Canada's decision, or to find a resolution to the problem that Alexis now faced, other than to require that the litigation be placed in abeyance.

Moreover, there is no reason for the panel to question the First Nation's decision to commence litigation in order to preserve its rights. Alexis had received no indication from DIAND that there was any reasonable prospect of a negotiated settlement in the near future. Although the panel agrees that Canada, where possible, should not be required to expend significant resources on two fronts – specific claims and the courts – in respect of the same claim, this situation was not the case here. The uncontroverted evidence of the First Nation is that it informed DIAND soon after the action was commenced that it would not pursue the action, including demanding a Statement of Defence, if its specific claim could proceed expeditiously. Further, Canada's letter of March 1, 1999, appears to confirm that its "litigate or negotiate" policy is designed to deal with a First Nation that "actively pursues its claim in the courts." The panel finds that DIAND's conduct in failing to properly advise Alexis of the consequences of commencing litigation and in failing to adapt its policy in order to permit the claims process to proceed while respecting the legal rights of the First Nation was the primary cause of the further one-year delay.

Alexis put its litigation into abeyance in March 1999 on the representation by Specific Claims that there would be a prompt response to its claim. DIAND and the Department of Justice resumed work on the claim, undertaking to provide the research and other materials to Alexis by the end of June. DIAND missed this deadline, which was then changed to July. According to a letter dated October 15, 1999, from Mr Slavik to the ICC, the research had still not been conveyed to the First Nation for review and no date for completion of the research had been given. It should be noted here that, once the First Nation received and commented on the second research report, the report and comments would be reviewed a second time by Justice, following which DIAND's preliminary position would be articulated to the First Nation. No estimated time frame for the conclusion of this process was conveyed to Alexis. Finally, in early December 1999, DIAND sent a draft research report to the First Nation with an indication that further revisions would be provided within the next two months. By then, over four years had passed from the filing of the claim.

The panel accepts Canada's explanation in its letter of July 30, 1999, from Ms Calvert to Mr Osborn that, contrary to Mr Slavik's statement in his letter of July 16, it would not take a further 18 to 24 months for the Department of Justice to render its legal opinion to DIAND, as the initial submission and historical report had already been reviewed by legal counsel. Ms Calvert's statement, however, that in general it takes approximately 30 months to complete the legal opinion on a claim is a startling admission, given that the opinion is only one part of the process preceding a decision on validation. This information supports the panel's finding that much of the delay was the result of the Department of Justice's review process.

The ICC ruling in Mikesew Cree First Nation, in which the Commission found that Canada's delay in rendering a decision on validation was tantamount to a rejection, is instructive on the principles that the ICC should apply in this mandate challenge. In that ruling, the panel referred to three cases[14] that set out the factors in determining whether a decision-maker has had a reasonable period of time to make a decision. In summary, the courts have held that what constitutes a reasonable time for a decision depends on the complexity of the issues, the circumstances of each case, and the possible prejudice to either party.

Can the delay in this instance be justified by the complexity of the claim? The Alexis claim alleges a breach of the statutory and fiduciary obligation by the Crown in its advice to the First Nation and in its negotiations with Calgary Power (now Transalta Utilities) to permit a series of easements over reserve land. The claim alleges that, as a result of the Crown's agreement with the utility, the First Nation received no annual payments for use of the easements and therefore lost significant revenues. The parties have not yet agreed upon the issues to be determined by the ICC nor has the Commission had the benefit of reviewing the second research report; nevertheless, it is apparent that the facts and issues in this claim will be relatively straightforward.

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[14] *Re Friends of Oldman River Society* (1993), 105 DLR (4th) 444 (FCTD); *R. v. Stapleton* (1983), 6 DLR (4th) 191 (NSCA); and *Re Delmas and Vancouver Stock Exchange* (1994), 119 DLR (4th) 136 (BCSC), discussed at page 6 of the ruling.

The panel concludes that, after more than four years, Canada has had sufficient time to determine whether it breached its lawful obligation to Alexis by failing to require the utility to pay an annual charge or rent. In particular, the panel finds that the time taken to complete the legal analysis, after which the First Nation was told only that further research was necessary, cannot be justified in a claim of this magnitude. Compounding this initial delay was the further delay caused by DIAND's policy to suspend all work when Alexis commenced litigation. Even though the research report is now complete and in the hands of the First Nation, Canada has not indicated any timetable for its decision once it has the First Nation's comments. In the circumstances, such a timetable is the least that the claimant should be able to expect.

The panel has also considered whether Canada would be prejudiced by a ruling permitting the ICC to review the claim as a "rejected" claim. In the first place, Alexis has put its litigation in abeyance at the request of Canada. Secondly, the final research report is now complete, subject to further modifications and comment by the First Nation. It is difficult to identify any prejudice to Canada at this time. On the contrary, the Commission's process of consolidating the historical documents and bringing the parties together in a planning conference to discuss the issues and evidence could assist Canada in finalizing its position. Finally, Canada retains the ability to reject the Commission's recommendations. This fact alone negates any ultimate prejudice to Canada by having the ICC review this claim. That being said, the Commission will consider any requests by Canada if it requires additional time to prepare for the ICC process.

Would there be prejudice to the First Nation if the ICC were not to assume jurisdiction over this claim? The litigation has now been in abeyance for more than one year. There is an undetermined time before the First Nation will know if its claim, now four and a half years old, has been accepted or rejected by DIAND. In our view, the longer that Alexis has to wait to advance its claim in either forum, the greater the potential of prejudice to the First Nation in being able to marshal the necessary evidence, in particular witnesses. In addition, although the panel has no information on the costs to Alexis of pursuing its claim, it is reasonable to assume that those costs will escalate the longer it waits for a decision from DIAND.

Although the panel does not have evidence before it that Alexis has suffered any prejudice to date, to permit this situation to continue would be grossly unfair to the First Nation. Alexis entered the claims process in good faith, in accordance with the principles, as enunciated in *Outstanding Business,* that there would be a fair, equitable, and expeditious resolution of its claim. This has not been the result, nor has the litigation progressed past the filing of a Statement of Claim almost two years ago. Further, given the monetary value of the claim, Alexis could well find that the cost of seeking redress over such a long period outweighs any compensation found to be owing. Even if the First Nation cannot at this time point to any tangible prejudice, we are prepared to conclude that, on balance, there is a likelihood of prejudice to its ability to resolve its claim should it remain any longer in the specific claims process.

For the reasons cited above, the panel finds that, on the facts of this case, the cumulative effect of several delays on the part of the Crown is tantamount to a rejection of the claim. There is no evidence that the delays could be justified by complexities in the case. Further, there is no evidence of prejudice to Canada by this finding, whereas there is a likelihood of prejudice to Alexis if the ICC does not intervene.

CONCLUSION

The response to Issue 1 is: Yes, a "rejection" can include certain circumstances in which Canada's conduct is tantamount to a rejection. The response to Issue 2 is: Yes, on the facts of this case, the delays by Canada were tantamount to a rejection. The Commission therefore retains its jurisdiction to review the claim. The parties will submit all relevant documents to the Commission and a first planning conference will be convened as soon as possible. The Commission remains ready to assist the parties wherever possible to find a resolution to this matter.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde Commission Co-Chair	Elijah Harper Commissioner	Sheila G. Purdy Commissioner

Dated this 27th day of April, 2000.

APPENDIX B

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

WITHOUT PREJUDICE

JAN 29 2001

Chief Francis Alexis
Alexis First Nation
P.O. Box 7
GLENEVIS AB   T0E 0X0

Dear Chief Alexis:

The purpose of this letter is to convey to you our preliminary position on the specific claim of the Alexis First Nation (FN) regarding the TransAlta Utilities Right-of-Way. Our position is preliminary in that we will consider any additional evidence or arguments you wish to present before a final position is taken. For the purpose of this position, the Specific Claims Branch (SCB) has reviewed the following materials:

1. The FN's submission entitled "Statement of Claim, Re: Breach of Crown's Fiduciary and Statutory Duty In Granting Right-of-Way to Calgary Power For Electrical Power Transmission Lines On Alexis Indian Reserve #133", together with 9 supporting documents and 1 map, dated October 4, 1995;
2. Addition to the Statement of Claim, based on a letter from TransAlta Utilities to the FN, dated November 29, 1995;
3. Addition to the Statement of Claim, based on the Supreme Court of Canada decision in Apsassin, dated April 23, 1996;
4. The FN's Powerline Easement Claim Report prepared for Specific Claims West, together with 40 supporting documents and 3 maps, dated April 29, 1996;
5. The FN's response to the Specific Claims West Report, dated August 11, 1996;

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6 The FN's Hydro Right-of-Way Claims Report prepared for SCB by Public History Inc., together with 223 supporting documents and 15 maps, dated November 12, 1997; and

7. Copy of Easement for Right-of-Way granted by Allan Strathcona Hodgson to Calgary Power Ltd. (CPL) for 5.16 acres for $492.80, dated April 12, 1969.

This letter is written on a "without prejudice" basis and should not be considered an admission of fact or liability by the Crown. Technical defences such as limitation periods, strict rules of evidence or the law of laches, have not been considered in this review. In the event this matter becomes the subject of litigation, the government reserves the right to plead these and all other defences available to it. Please be advised as well that our government files are subject to the *Access to Information Act* and the *Privacy Act*.

Our position is based on a comprehensive review of the facts of the claim as contained in the research conducted by the band and by this office. As a result of our review of the TransAlta Utilities Right-of-Way claim, it is our preliminary position that under the Specific Claims Policy, entitled *Outstanding Business, A Native Claims Policy*, there is no outstanding lawful obligation on the part of the Government of Canada. Briefly, based on the allegations of the FN (set out below and underlined), the reasons for our position are as follows:

1959 Permit

1. Canada failed to obtain any lump sum compensation whatsoever for the land allocated to CPL under the subsection 28(2) Permit in 1959 or to obtain any annual charges, fees or assessments for the next ten years.

   The FN approved, by means of a Band Council Resolution (BCR) dated October 21, 1959, that it would not receive any compensation. This was because the FN was the sole beneficiary of the permit as the hydro line in question was constructed to serve the school on the reserve. In addition, the Department of Indian Affairs and Northern Development was absorbing the cost of the transmission line.

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2. Neither the 1959 Agreement nor the subsection 28(2) Permit has a term allowing Canada or the Band Council to impose an annual charge, tax or fee for the use of the reserve land by CPL.

   No compensation for use was necessary, as outlined above. The Band Council had a taxation power pursuant to the *Indian Act*; the failure of the Band Council to exercise this power is not the responsibility of the Crown. The Crown had no obligation to advise the FN of all its various powers under the *Indian Act*. Furthermore, there is no evidence in support of an allegation that the Crown did not advise the FN of its taxing powers.

1967 Permit

3. The July 1967 Agreement contained no term regarding the amount of any annual charge or assessment to be paid by CPL.

   There is no evidence that the total compensation paid by CPL was inadequate.

4 There is no BCR approving or acknowledging the land description amendment set out in the agreement of February 12, 1968.

   Because the amendment to the agreement of February 12, 1968 (to make reference to a particular plan of survey) did not alter the location of the right-of-way as referred to in the April 4, 1966 BCR, the FN's consent was still valid.

1969 Consent to Transfer In Lieu of Expropriation

5. Under the 1969 Agreement Canada could have imposed a charge, rent, or assessment on CPL or stipulated an annual charge, rent or assessment in the agreement. By not doing so, Canada acted contrary to the interests of the Band and violated the fiduciary's standard of conduct to act prudently and reasonably in the best interest of the beneficiary.

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The Agreement provides that CPL shall pay any charges, rents, assessments etc., that shall be due and owing. The Agreement is not a source of an obligation that the Crown impose an annual charge. The total compensation paid by CPL was appropriate and was agreed to by the FN (please see point 9 for more detail regarding the total compensation).

6. The Band was not a party or a witness to the 1969 Agreement between Canada and CPL.

There is no requirement that the FN be a party or a witness to the Agreement. Furthermore, the FN did consent in the 1968 BCR.

7. At no time did Canada advise the Band that it could pass a taxation by-law or levy an annual fee, assessment or charge against CPL under its powers pursuant to the *Indian Act*, its inherent right to self-government, or the terms of the 1969 Agreement. Canada failed to advise or assist the Band in drafting and enacting a taxation by-law which would have enabled it to acquire substantial tax revenues from the presence of the third party interest on the reserve.

The failure of the Band Council to exercise its taxing power is not the responsibility of the Crown. The Crown had no obligation to advise the FN of all its various powers under the *Indian Act*. Furthermore, there is no evidence in support of an allegation that the Crown did not advise the FN of its taxing powers.

8. Canada knew, or ought to have known, that in 1969, municipal districts, counties, or improvement districts were charging taxes and assessments on electrical power transmission line easements off-reserve and could have imposed similar rates for on-reserve easements. Further, Canada failed to obtain an independent assessment of the fees CPL was paying to adjacent municipalities and Provincial jurisdictions for easements or rights-of-way for the same transmission line.

No evidence has been provided to substantiate the claim that local governments or other reserves in Alberta are obtaining annual fees in addition to lump sum compensation. As regards taxation, as distinct from compensation, see point 7 above.

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9 Canada did not follow standard off-reserve practices of local governments by failing to obtain either an annual charge or fee against CPL, as was common practice in municipalities and improvement districts in Alberta. Canada was in breach of its statutory and fiduciary duty in not obtaining annual charges, assessments, or rates from CPL, knowing that the s. 35 Order-in-Council was for an indeterminate and lengthy period of time and that the agreement made provisions for such annual rates or charges.

There is no evidence that it was the standard off-reserve practice to obtain annual charges instead of lump sum compensation. In any event, the evidence demonstrates that the value of the land was established at $70.00 to $100.00 per acre for cultivated land and $30.00 to $50.00 per acre for undeveloped land. The FN received $100.00 per acre for an area of 42.96 acres. Recent information received from TransAlta states that an off-reserve owner was paid $95.50 per acre. The FN itself consented to lump sum compensation in its 1968 BCR. The total compensation received was adequate.

10. With respect to the 1969 Agreement, there is no evidence that Canada advised the Band of the following:

(i) That independent appraisals of the fair market value of the land to be set aside by the subsection 28(2) Permit in 1959 or expropriated pursuant to section 35 of the *Indian Act* were undertaken by Canada and made available to the Band Council on either occasion to assist them in negotiations. Canada failed to act cautiously or prudently by not obtaining an independent appraisal of the fair market value of the expropriated land and subsequently advising the Chief and Council.

As indicated above, the evidence demonstrates that the value of the land was established at $70.00 to $100.00 per acre for cultivated land and $30.00 to $50.00 per acre for undeveloped land. The FN received $100.00 per acre for an area of 42.96 acres. Recent information received from TransAlta states that an off-reserve owner was paid $95.50 per acre. The FN itself consented to lump sum compensation in its 1968 BCR. The total compensation received was adequate.

(ii) That the Chief and Council were not advised in 1959 or 1969 that they could refuse to grant permission for an easement or right-of-way, nor were they given an idea of the costs which CPL would incur as a result of their refusal to grant such permission. They were not given any advice by Canada on the opportunity costs to CPL and the strength of their bargaining position in regard to granting the right-of-way and the amount of the one-time payment or annual rent.

The Band Council had the opportunity to accept or refuse to grant permission for an easement. Discussions took place as to whether annual payments should be imposed in lieu of lump sum compensation. After arriving at the conclusion that the lump sum compensation of $4,296.00 was in the best interest of the FN, the option of annual payments was rejected and was in accordance with the wishes of the FN.

(iii) That Canada attempted to negotiate with CPL for either a larger one-time payment or imposed, or even suggested to CPL that they would impose, an annual charge or assessment as they were entitled to do, as set out in the agreement.

The Band Council approved lump sum compensation in its 1968 BCR and approved the other easements by BCR. In regard to the sufficiency of total compensation, the evidence demonstrates that this compensation was fully adequate. (please see point 9 above.)

11. Canada did not retain independent legal advice for either the Band or themselves.

There was no obligation on Canada to provide independent legal advice in the present circumstances. There is no evidence to suggest that the FN suffered any damages as a result of the absence of independent legal advice.

12. Canada did not obtain the knowledgeable and informed consent of the Chief and Council to any of the above transactions.

The Band Council indicated its consent through the passing of three BCRs. There is no evidence in support of an allegation that the Chief and Council were not kept informed as necessary.

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13. Canada officials knew that in 1959 and 1969 most of the Chief and Council could not read or write, were not experienced or knowledgeable in the negotiation of such agreements and relied exclusively on the advice on such matters provided to them by Canada. As such, they were vulnerable and dependent, not only upon the advice on the terms of the agreements and permit provided to them by Canada. They were not signatories in any capacity to any of the agreements between Canada and CPL.

    There is no legal requirement that the Band Council be witnesses or signatories to a permit of occupation or consent to a public taking. The Band's decisions were respected and there is no evidence that these transactions were exploitative or in any way improper.

14. From 1969 to December 31, 1995, the Band has not received any annual fee, charges, tax, or rent from TransAlta. Further, during this period, the Band was denied use of the land for other purposes and potential sources of revenue.

    Lump sum compensation was paid by CPL to the FN for the use of the land, for as long as required for the purpose of the hydro line. That compensation was adequate and equalled or exceeded the sale price that would have been received for the land's use. Additional periodic compensation was not necessary in order for the total compensation to be adequate.

15. Since the granting of the Order in Council and agreement in October 1969, Canada has taken no initiatives or made no efforts to charge any annual fee, rent, or assessment on behalf of the Band against CPL or its successor, TransAlta Utilities, and thus obtain any revenue to which the Band was entitled pursuant to the agreement.

    Please see point 9 regarding total compensation and point 14 regarding additional periodic compensation. Canada did not have an obligation to take the initiative or to make efforts to charge any additional fee or to obtain any additional revenue.

Prior to Canada finalizing its position regarding your claim, please be assured that members from this office and the Department of Justice, would be willing to meet with you, members from the Alexis First Nation and their legal counsel to discuss our preliminary position in greater detail.

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I should also note that your FN has the option to submit this claim to the Indian Claims Commission and request that the Commission hold an inquiry into the reasons for the rejection. Should the Alexis First Nation prefer to proceed on that basis, without submitting additional evidence or legal argument, then this letter will serve as evidence, for the purposes of the Commission, that the Government of Canada could not accept this claim for negotiation under the Specific Claims Policy.

Please do not hesitate to contact Mr. Wayne Daugherty, Acting Senior Analyst at (819) 953-3170 to schedule a meeting.

Yours sincerely,

W.J.R. Austin
Assistant Deputy Minister
Claims and Indian Government

APPENDIX C

INTERIM RULING: KATHLEEN N. LICKERS, COMMISSION COUNSEL, TO JEROME N. SLAVIK, ACKROYD PIASTA ROTH & DAY, BARRISTERS & SOLICITORS, AND CAROLE VARY, DIAND LEGAL SERVICES, MARCH 9, 2001

Via Facsimile

March 9, 2001

Mr. Jerome N. Slavik
Ackroyd Piasta, Roth & Day
First Edmonton Place
1500-10665 Jasper Place
Edmonton, Alberta, T5J 3S9
- AND -
Ms. Carole Vary
DIAND, Legal Services
10 Wellington Street - 10th Floor
Hull, Quebec, K1A 0H4
Dear Madame and Sir:

Re: Alexis First Nation [TransAlta Utilities]
Our File 2108-01-02

On February 9, 2001, I convened a conference call at the request of Ms. Carole Vary, Legal Counsel, DIAND Legal Services, to discuss the 1998 statement of claim filed by the Alexis First Nation in the Federal Court of Canada and whether the First Nation would continue to hold its claim in abeyance pending completion of the Commission's inquiry. Ms. Vary was particularly concerned because if the First Nation were to decide to actively pursue its litigation, then Canada's statement of defence would be due to the court by February 16, 2001.

After a lengthy discussion, I undertook to provide the Commission's answer to the question of whether it would continue with its inquiry in the face of litigation proceeding simultaneously. On agreement of the parties I put this question to the Commissioners based on our teleconference discussion.

The Commissioners considered the matter and did decide on February 9, 2001 to continue with the inquiry knowing that the Alexis First Nation was in the pleadings stage of litigation in the Federal Court. To allow Canada to meet its February 16, 2001 deadline, I delivered this decision verbally to all parties.

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On February 27, 2001, I again convened a conference call. This call was intended to discuss Canada's position, communicated verbally by Ms. Vary, that if the First Nation continued with its litigation and the Commission proceeded with its inquiry, then Canada would only attend the Commission's inquiry as an "observer".

During the course of our February 27, 2001 teleconference, the parties requested the written reasons for the Commission's decision to proceed with the Alexis First Nation inquiry. This letter serves as the written reasons for the Commission's decision.

The mandate of the Commission is contained in Order in Council PC 1992-1730, July 27, 1992, which states, among other things, that the Commissioners shall:

> inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister;
>
> And are authorized:
>
> i) *to adopt such methods, subject to subparagraph (iii), as they may consider expedient for the conduct of the inquiry* and to sit at such times and in such places as they may decide, (emphasis added)
>
> iii) to provide or arrange, at the request of the parties such mediation services as may in their opinion assist the Government of Canada and an Indian band to reach an agreement in respect of any matter relating to an Indian specific claim.

The Commission is an independent and neutral third party to a specific claim dispute and once requested by a First Nation, is mandated to review Canada's decision to reject a claim as disclosing no outstanding lawful obligation, a position Canada has taken in the case of the Alexis First Nation. Our mission is to assist the parties in the resolution of outstanding claims. At every stage of our process, the Commission encourages the parties to use methods for dispute resolution in an effort to resolve outstanding issues without the need for a full inquiry. In discharging our function, we are required to consider government policy but we are not bound by it.

The Government of Canada has relied upon its specific claims policy to preclude a First Nation from proceeding before the courts and the specific claims process at the same time. Canada has

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not however, provided the Commission with the documentary support for this position and we ask that this be so provided. Contrary to the representations of some of Canada's counsel, the Commission's process is not simply an extension of the Department of Indian Affairs, Specific Claims Branch review of a specific claim. If the Government of Canada takes this view of our mandate we request that we be advised, in writing. We are a separate and independent process of inquiry mandated by Order in Council to conduct inquiries pursuant to the *Inquiries Act*. In our view, once rejected, a claimant First Nation can request the Commission to use its power of inquiry and still take action to preserve its rights in the courts of this country.

In the case of the Alexis First Nation, the litigation that is proceeding in the Federal Court is in its initial stages and pleadings have not yet closed. By all accounts, it will be some time before a final judgment is rendered and for this reason, we do not believe our decision to proceed will prejudice either party as we proceed to complete this inquiry. The Commission believes, dependent upon the preparedness of the parties, that its inquiry can be complete *before* a final judgment is rendered. If this were the case, Canada would be in a position to respond to the Commission's findings and recommendations which again may provide the parties with an opportunity to avoid protracted litigation.

Alternatively, should a final judgment be rendered before the inquiry is complete, the parties and the Commission would be bound by the court's determination of the same issues. The Commission faced such a situation in the *Chippewas of Kettle and Stoney Point First Nation 1927 Surrender Inquiry* where Canada's motion for summary judgment proceeded in the Ontario Court (General Division) simultaneous to the Commission's inquiry. In that case the Commission convened two planning conferences in April and October 1994 in an effort to clarify and resolve matters as much as possible at a preliminary stage. The motion for summary judgment was argued in December 1994. The Commission's inquiry continued into 1995 and culminated with legal argument in October 1995. On August 18, 1995, the court granted Canada's motion for summary judgment, a decision upheld an appeal by the Ontario Court of Appeal on December 2, 1996. The Commission released its final report on March 13, 1997.

In our view, the Commission's process operates independent of and separate from the specific claims process and it is essential to continued public confidence in the administration of justice that the Commission in fact be independent of the specific claims process and its adopted practices, namely requiring the Alexis First Nation to put its litigation into abeyance while the Band proceeds through its inquiry to conclusion.

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In conclusion, the Commission is prepared to proceed with the community session stage of the Alexis First Nation inquiry. The First Nation has expressed its willingness to proceed with this session on either March 29/30 or April 5/6, 2001. On February 27, 2001, Mr. Slavik proposed to hold the Alexis First Nation litigation in abeyance pending completion of the oral arguments to the Commission.

Again, depending upon the preparedness of the parties, the community session and legal argument stage of inquiry could be scheduled in the near future. Mr. Winogron and Ms. Vary agreed to take Mr. Slavik's proposal under advisement and respond in writing. We look forward to Canada's expeditious reply.

Yours truly,

Kathleen N. Lickers
Commission Counsel

cc: Chief Francis Alexis, Alexis First Nation
Robert Winogron, DIAND, Legal Services

APPENDIX D

ALEXIS FIRST NATION INQUIRY – TRANSALTA UTILITIES RIGHTS OF WAY CLAIM

1	Planning conference	Edmonton, July 28, 2000
2	Interim rulings	
	– regarding deemed rejection of claim	April 27, 2000
	– regarding parallel proceedings in Federal Court	March 9, 2001
3	Community session	Alexis First Nation IR 133, December 5, 2001

The Commission heard evidence from Alexis First Nation elders Howard Mustus, Phillip Cardinal, Nelson Alexis, and Chief Francis Alexis.

4	Legal argument	Edmonton, August 20, 2002
5	Content of formal record	

The formal record for the Alexis First Nation Inquiry consists of the following materials:

- the documentary record (4 volumes of documents) (Exhibits 1-10)
- transcript from the community session (1 volume) (Exhibit 11)
- the letter of rejection dated January 29, 2001 (Exhibit 12)
- Alexis First Nation Property Tax By-Law dated July 27, 1999 (Exhibit 13)
- written submissions of counsel for Canada and counsel for the Alexis First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

Indian Claims Commission

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